CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 00–11)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR FEBRUARY 2000

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): February 21, 2000.

Austria schilling:

February 1, 2000	$0.070718
February 2, 2000	.070987
February 3, 2000	.071852
February 4, 2000	.070929
February 5, 2000	.070929
February 6, 2000	.070929
February 7, 2000	.071096
February 8, 2000	.071670
February 9, 2000	.072048
February 10, 2000	.071692
February 11, 2000	.071561
February 12, 2000	.071561
February 13, 2000	.071561
February 14, 2000	.071096
February 15, 2000	.071466
February 16, 2000	.071525
February 17, 2000	.071677
February 18, 2000	.071583
February 19, 2000	.071583
February 20, 2000	.071583
February 21, 2000	.071583
February 22, 2000	.073109
February 23, 2000	.072796
February 24, 2000	.072171
February 25, 2000	.070950
February 26, 2000	.070950
February 27, 2000	.070950
February 28, 2000	.070267
February 29, 2000	.070078

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Belgium franc:

February 1, 2000	$0.024123
February 2, 2000	.024214
February 3, 2000	.024509
February 4, 2000	.024194
February 5, 2000	.024194
February 6, 2000	.024194
February 7, 2000	.024251
February 8, 2000	.024447
February 9, 2000	.024576
February 10, 2000	.024455
February 11, 2000	.024410
February 12, 2000	.024410
February 13, 2000	.024410
February 14, 2000	.024251
February 15, 2000	.024378
February 16, 2000	.024398
February 17, 2000	.024450
February 18, 2000	.024418
February 19, 2000	.024418
February 20, 2000	.024418
February 21, 2000	.024418
February 22, 2000	.024938
February 23, 2000	.024831
February 24, 2000	.024618
February 25, 2000	.024202
February 26, 2000	.024202
February 27, 2000	.024202
February 28, 2000	.023969
February 29, 2000	.023904

Finland markka:

February 1, 2000	$0.163664
February 2, 2000	.164286
February 3, 2000	.166287
February 4, 2000	.164151
February 5, 2000	.164151
February 6, 2000	.164151
February 7, 2000	.164538
February 8, 2000	.165867
February 9, 2000	.166742
February 10, 2000	.165917
February 11, 2000	.165615
February 12, 2000	.165615
February 13, 2000	.165615
February 14, 2000	.164538
February 15, 2000	.165396
February 16, 2000	.165531
February 17, 2000	.165884
February 18, 2000	.165665
February 19, 2000	.165665
February 20, 2000	.165665
February 21, 2000	.165665
February 22, 2000	.169197
February 23, 2000	.168474
February 24, 2000	.167027

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Finland markka (continued):	
February 25, 2000	$0.164202
February 26, 2000	.164202
February 27, 2000	.164202
February 28, 2000	.162621
February 29, 2000	.162184
France franc:	
February 1, 2000	$0.148348
February 2, 2000	.148912
February 3, 2000	.150726
February 4, 2000	.148790
February 5, 2000	.148790
February 6, 2000	.148790
February 7, 2000	.149141
February 8, 2000	.150345
February 9, 2000	.151138
February 10, 2000	.150391
February 11, 2000	.150117
February 12, 2000	.150117
February 13, 2000	.150117
February 14, 2000	.149141
February 15, 2000	.149918
February 16, 2000	.150040
February 17, 2000	.150360
February 18, 2000	.150162
February 19, 2000	.150162
February 20, 2000	.150162
February 21, 2000	.150162
February 22, 2000	.153364
February 23, 2000	.152708
February 24, 2000	.151397
February 25, 2000	.148836
February 26, 2000	.148836
February 27, 2000	.148836
February 28, 2000	.147403
February 29, 2000	.147007
Germany deutsche mark:	
February 1, 2000	$0.497538
February 2, 2000	.499430
February 3, 2000	.505514
February 4, 2000	.499021
February 5, 2000	.499021
February 6, 2000	.499021
February 7, 2000	.500197
February 8, 2000	.504236
February 9, 2000	.506895
February 10, 2000	.504389
February 11, 2000	.503469
February 12, 2000	.503469
February 13, 2000	.503469
February 14, 2000	.500197
February 15, 2000	.502804
February 16, 2000	.503213
February 17, 2000	.504287
February 18, 2000	.503623

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Germany deutsche mark (continued):

February 19, 2000	$0.503623
February 20, 2000	.503623
February 21, 2000	.503623
February 22, 2000	.514360
February 23, 2000	.512161
February 24, 2000	.507764
February 25, 2000	.499174
February 26, 2000	.499174
February 27, 2000	.499174
February 28, 2000	.494368
February 29, 2000	.493039

Greece drachma:

February 1, 2000	$0.002933
February 2, 2000	.002942
February 3, 2000	.002978
February 4, 2000	.002934
February 5, 2000	.002934
February 6, 2000	.002934
February 7, 2000	.002941
February 8, 2000	.002965
February 9, 2000	.002982
February 10, 2000	.002961
February 11, 2000	.002956
February 12, 2000	.002956
February 13, 2000	.002956
February 14, 2000	.002936
February 15, 2000	.002951
February 16, 2000	.002952
February 17, 2000	.002954
February 18, 2000	.002951
February 19, 2000	.002951
February 20, 2000	.002951
February 21, 2000	.002951
February 22, 2000	.003013
February 23, 2000	.003000
February 24, 2000	.002971
February 25, 2000	.002921
February 26, 2000	.002921
February 27, 2000	.002921
February 28, 2000	.002896
February 29, 2000	.002888

Ireland pound:

February 1, 2000	$1.235582
February 2, 2000	1.240280
February 3, 2000	1.255390
February 4, 2000	1.239264
February 5, 2000	1.239264
February 6, 2000	1.239264
February 7, 2000	1.242185
February 8, 2000	1.252216
February 9, 2000	1.258818
February 10, 2000	1.252597
February 11, 2000	1.250311
February 12, 2000	1.250311

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Ireland pound (continued):	
February 13, 2000	$1.250311
February 14, 2000	1.242185
February 15, 2000	1.248660
February 16, 2000	1.249676
February 17, 2000	1.252343
February 18, 2000	1.250692
February 19, 2000	1.250692
February 20, 2000	1.250692
February 21, 2000	1.250692
February 22, 2000	1.277357
February 23, 2000	1.271897
February 24, 2000	1.260977
February 25, 2000	1.239645
February 26, 2000	1.239645
February 27, 2000	1.239645
February 28, 2000	1.227710
February 29, 2000	1.224408
Italy lira:	
February 1, 2000	$0.000503
February 2, 2000	.000504
February 3, 2000	.000511
February 4, 2000	.000504
February 5, 2000	.000504
February 6, 2000	.000504
February 7, 2000	.000505
February 8, 2000	.000509
February 9, 2000	.000512
February 10, 2000	.000509
February 11, 2000	.000509
February 12, 2000	.000509
February 13, 2000	.000509
February 14, 2000	.000505
February 15, 2000	.000508
February 16, 2000	.000508
February 17, 2000	.000509
February 18, 2000	.000509
February 19, 2000	.000509
February 20, 2000	.000509
February 21, 2000	.000509
February 22, 2000	.000520
February 23, 2000	.000517
February 24, 2000	.000513
February 25, 2000	.000504
February 26, 2000	.000504
February 27, 2000	.000504
February 28, 2000	.000499
February 29, 2000	.000498
Luxembourg franc:	
February 1, 2000	$0.024123
February 2, 2000	.024214
February 3, 2000	.024509
February 4, 2000	.024194
February 5, 2000	.024194
February 6, 2000	.024194

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Luxembourg franc (continued):

February 7, 2000	$0.024251
February 8, 2000	.024447
February 9, 2000	.024576
February 10, 2000	.024455
February 11, 2000	.024410
February 12, 2000	.024410
February 13, 2000	.024410
February 14, 2000	.024251
February 15, 2000	.024378
February 16, 2000	.024398
February 17, 2000	.024450
February 18, 2000	.024418
February 19, 2000	.024418
February 20, 2000	.024418
February 21, 2000	.024418
February 22, 2000	.024938
February 23, 2000	.024831
February 24, 2000	.024618
February 25, 2000	.024202
February 26, 2000	.024202
February 27, 2000	.024202
February 28, 2000	.023969
February 29, 2000	.023904

Netherlands guilder:

February 1, 2000	$0.441574
February 2, 2000	.443253
February 3, 2000	.448652
February 4, 2000	.442889
February 5, 2000	.442889
February 6, 2000	.442889
February 7, 2000	.443933
February 8, 2000	.447518
February 9, 2000	.449878
February 10, 2000	.447654
February 11, 2000	.446837
February 12, 2000	.446837
February 13, 2000	.446837
February 14, 2000	.443933
February 15, 2000	.446247
February 16, 2000	.446610
February 17, 2000	.447563
February 18, 2000	.446974
February 19, 2000	.446974
February 20, 2000	.446974
February 21, 2000	.446974
February 22, 2000	.456503
February 23, 2000	.454552
February 24, 2000	.450649
February 25, 2000	.443026
February 26, 2000	.443026
February 27, 2000	.443026
February 28, 2000	.438760
February 29, 2000	.437580

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Portugal escudo:

February 1, 2000	$0.004854
February 2, 2000	.004872
February 3, 2000	.004932
February 4, 2000	.004868
February 5, 2000	.004868
February 6, 2000	.004868
February 7, 2000	.004880
February 8, 2000	.004919
February 9, 2000	.004945
February 10, 2000	.004921
February 11, 2000	.004912
February 12, 2000	.004912
February 13, 2000	.004912
February 14, 2000	.004880
February 15, 2000	.004905
February 16, 2000	.004909
February 17, 2000	.004920
February 18, 2000	.004913
February 19, 2000	.004913
February 20, 2000	.004913
February 21, 2000	.004913
February 22, 2000	.004018
February 23, 2000	.004996
February 24, 2000	.004954
February 25, 2000	.004870
February 26, 2000	.004870
February 27, 2000	.004870
February 28, 2000	.004823
February 29, 2000	.004810

South Korea won:

February 1, 2000	$0.000887
February 2, 2000	.000884
February 3, 2000	.000885
February 4, 2000	.000885
February 5, 2000	.000885
February 6, 2000	.000885
February 7, 2000	.000885
February 8, 2000	.000885
February 9, 2000	.000890
February 10, 2000	.000892
February 11, 2000	.000897
February 12, 2000	.000897
February 13, 2000	.000897
February 14, 2000	.000887
February 15, 2000	.000887
February 16, 2000	.000888
February 17, 2000	.000887
February 18, 2000	.000886
February 19, 2000	.000886
February 20, 2000	.000886
February 21, 2000	.000886
February 22, 2000	.000881
February 23, 2000	.000880
February 24, 2000	.000874

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

South Korea won (continued):

February 25, 2000	$0.000880
February 26, 2000	.000880
February 27, 2000	.000880
February 28, 2000	.000881
February 29, 2000	.000884

Spain peseta:

February 1, 2000	$0.005848
February 2, 2000	.005871
February 3, 2000	.005942
February 4, 2000	.005866
February 5, 2000	.005866
February 6, 2000	.005866
February 7, 2000	.005880
February 8, 2000	.005927
February 9, 2000	.005958
February 10, 2000	.005929
February 11, 2000	.005918
February 12, 2000	.005918
February 13, 2000	.005918
February 14, 2000	.005880
February 15, 2000	.005910
February 16, 2000	.005915
February 17, 2000	.005928
February 18, 2000	.005920
February 19, 2000	.005920
February 20, 2000	.005920
February 21, 2000	.005920
February 22, 2000	.006046
February 23, 2000	.006020
February 24, 2000	.005969
February 25, 2000	.005868
February 26, 2000	.005868
February 27, 2000	.005868
February 28, 2000	.005811
February 29, 2000	.005796

Taiwan N.T. dollar:

February 1, 2000	$0.031496
February 2, 2000	.032468
February 3, 2000	.032468
February 4, 2000	.032468
February 5, 2000	.032468
February 6, 2000	.032468
February 7, 2000	.032468
February 8, 2000	.032520
February 9, 2000	.032626
February 10, 2000	.032626
February 11, 2000	.032648
February 12, 2000	.032648
February 13, 2000	.032648
February 14, 2000	.032552
February 15, 2000	.032520
February 16, 2000	.032552
February 17, 2000	.032552
February 18, 2000	.032504

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2000 (continued):

Taiwan N.T. dollar (continued):

February 19, 2000	$0.032504
February 20, 2000	.032504
February 21, 2000	.032504
February 22, 2000	.032468
February 23, 2000	.032468
February 24, 2000	.032415
February 25, 2000	.032468
February 26, 2000	.032468
February 27, 2000	.032468
February 28, 2000	.032468
February 29, 2000	.032510

Dated: March 1, 2000.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 00–12)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice; correction.

SUMMARY: This document corrects an erroneous Treasury Decision (T.D.) designation on a document recently published in the Federal Register.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 25, 2000, Customs published in the Federal Register (65 FR 10152) a general notice advising the public that three Customs broker license references had been erroneously included in a list of revoked Customs broker licenses previously published in the Federal Register. However, that February 25, 2000, notice was incorrectly designated in the headings section as Treasury Decision (T.D.) 00–9; the designation should have read "T.D. 00–12". This document corrects that designation error.

CORRECTION OF PUBLICATION

In the general notice published in the Federal Register at 65 FR 10152 on February 25, 2000, as Treasury Decision 00–9, the reference to "T.D. 00–9" in the headings section is corrected to read "T.D. 00–12".

Dated: February 28, 2000.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, March 2, 2000 (65 FR 11367)]

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19 CFR Parts 12 and 178

(T.D. 00–13)

RIN 1515–AC04

IMPORTATION OF CHEMICALS SUBJECT TO THE TOXIC SUBSTANCES CONTROL ACT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth final amendments to the Customs Regulations regarding submission of an importer's certification in connection with the importation of chemical substances subject to the Toxic Substances Control Act. The regulatory amendments reduce the regulatory burden by permitting use of a blanket certification for multiple shipments in lieu of a separate certification for each individual shipment. The final regulations also continue the present practice of allowing some flexibility regarding presentation of the required certification with the entry documentation for an individual shipment.

EFFECTIVE DATE: March 30, 2000.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Field Operations (202–927–0192).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.*) was enacted by Congress, among other things, to protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances. Section 13 of Title I of the TSCA (15 U.S.C.

2612) governs the entry of those chemical substances into the customs territory of the United States and authorizes the Secretary of the Treasury to refuse entry of any chemical substance that (1) fails to comply with any rule in effect under the TSCA or (2) is offered for entry in violation of section 5 or 6 of Title I (15 U.S.C. 2604 or 2605) or Title IV (15 U.S.C. 2681 *et seq.*) or in violation of a rule or order under section 5 or 6 or Title IV or in violation of an order issued in a civil action brought under section 5 or under section 7 of Title I (15 U.S.C. 2606) or under Title IV. Section 13 also sets forth procedural and other requirements in connection with an entry refusal and authorizes the Secretary of the Treasury, after consultation with the Administrator of the Environmental Protection Agency (EPA), to issue rules for the administration of section 13.

The regulations implementing section 13 are contained in §§ 12.118–12.127 of the Customs Regulations (19 CFR 12.118–12.127). Within those regulations, § 12.121 concerns reporting requirements. Paragraph (a) of that section covers chemical substances imported in bulk or as part of a mixture and provides for submission of a signed certification by the importer or his authorized agent stating, in the alternative, (1) that all chemical substances in the shipment comply with all applicable rules or orders under the TSCA and that the importer is not offering a chemical substance for entry in violation of the TSCA or any rule or order thereunder (a positive certification) or (2) that all chemicals in the shipment are not subject to the TSCA (a negative certification). Paragraph (a) further requires that the certification be filed with the director of the port of entry before release of the shipment and provides that the certification may appear as a typed or stamped statement (1) on the entry document or commercial invoice, or on a preprinted attachment to the entry document or commercial invoice, or (2) in the case of a release under a special permit for an immediate delivery under § 142.21 of the Customs Regulations (19 CFR 142.21) or in the case of an entry under § 142.3 of the Customs Regulations (19 CFR 142.3), on the commercial invoice or an attachment to the commercial invoice. Paragraph (b) of § 12.121 provides that the provisions of paragraph (a) apply to a chemical substance or mixture as part of an article only if required by a rule or order under the TSCA. Paragraph (c) of that section provides that a certification under paragraph (a) may be signed by means of an authorized facsimile signature.

On January 9, 1990, Customs published a notice of proposed rulemaking in the Federal Register (55 FR 738) to amend § 12.121. The proposed amendments included the following changes to paragraph (a): (1) to provide for placement of the typed or stamped certification statement only on the invoice used in connection with the entry and entry summary procedures (and, thus, no longer on the entry document or on an attachment to the entry document or commercial invoice); and (2) in the case of entries or entry summaries processed electronically, to provide for a certification statement in the form of a certification code

transmitted as part of the Automated Broker Interface (ABI) transmission. In addition, in order to simplify procedures for importers who regularly import chemicals, it was proposed to add a new paragraph (b) to permit the use of "blanket" certifications, with a consequential redesignation of present paragraphs (b) and (c) as (c) and (d), respectively. Finally, it was proposed to make a conforming change to newly redesignated paragraph (c), consisting of the addition of a reference to new paragraph (b). The notice solicited comments from the public on the proposals, and the public comment period closed on March 12, 1990. On January 22, 1990, Customs published in the Federal Register (55 FR 2100) a correction document setting forth, with regard to the proposed blanket certification procedure, a statement regarding collection of information review requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)).

Discussion of Comments

A total of 19 commenters responded to the solicitation of comments in the January 9, 1990, notice. A summary of the submitted comments, and the Customs responses to those comments, are set forth below.

Comment:

Thirteen commenters were opposed to the proposal regarding inclusion of the certification only on the commercial invoice, and two commenters were in favor of that proposal. Comments against the proposal cited the procedural burden and inefficiency that would result from the proposed restriction, particularly in view of the unavailability of the original invoice for some shipments, the lack of sufficient space on the invoice, the need for a separate certification document in order to avoid delays in the case of air shipments, express consignment shipments and shipments from contiguous countries, and the lack of control by the importer of record where the certification is placed on the invoice by another party.

Customs response:

The proposal in question was not intended to increase the regulatory burden or to have any of the other adverse effects cited by these commenters. Based on the submitted comments and as a result of further review of this matter, including consultation with the EPA which raised the issue that the proposal was intended to address, Customs has determined that it would be preferable to maintain the status quo under which the importer has the option of including the certification on the commercial invoice or on the entry document or on an attachment to the commercial invoice or entry document. Accordingly, the text of § 12.121, as set forth below, continues to reflect the substance of the current regulatory text in this regard.

Comment:

One commenter requested that the TSCA certification be made a requirement for the entry summary rather than a condition of entry.

Customs response:

As indicated above, the TSCA refers specifically to the "entry" of chemical substances into the Customs territory of the United States. Given the wording of the statute and the clear purpose of the TSCA, which is to protect the health and safety of the general public, the regulation in question must apply for admissibility purposes (that is, when a determination is made as to whether the imported merchandise may be released from Customs custody into the commerce of the United States) rather than in connection with a subsequent filing of the entry summary. Accordingly, the suggestion of this commenter should not be adopted.

Comment:

Ten commenters specifically supported the proposed blanket certification procedure, four commenters were against it, and two commenters stated that the blanket certification should be optional rather than mandatory. Of the four comments against the proposal, two commenters argued that a blanket procedure is not feasible where imported mixtures are involved because changes in the chemical composition of a product prior to export could render the blanket certification inaccurate. The other two commenters stated that the proposal would not work in practice because it does not provide for nationwide acceptance of the blanket certification but rather requires separate approval at the local level.

Customs response:

While it is true that changes in the composition of an imported product could negate the applicability of a previously approved blanket certification, Customs notes that the importer of record is always responsible for ascertaining the true facts regarding an individual import transaction, including for purposes of deciding whether it would be appropriate to rely on a blanket certification on file with Customs. With regard to the lack of provision for nationwide acceptance of a blanket approval, Customs remains of the view that, for operational purposes, approval must take place at the local port level.

Customs believes that the significant number of favorable comments supports the appropriateness of the blanket certification procedure which was intended to simplify procedures and thus reduce the overall regulatory burden on the importing public. Accordingly, § 12.121, as set forth below, incorporates the proposed blanket certification procedure.

With regard to the optional versus mandatory issue, Customs believes that the regulatory text clearly gives the importer the option (and thus does not impose a requirement) of using the blanket certification procedure, subject only to the port director's exercise of his discretion in accepting the blanket certification.

Comment:

Three commenters proposed elimination of the TSCA certification for merchandise subject to FDA 701 requirements and for pesticides

subject to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as exempted in section 3 of the TSCA and identified in the EPA publication "Toxic Substances Control Act, A Guide for Chemical Importers/Exporters."

Customs response:

Customs has been advised by EPA that the Guide referred to by these commenters provides that articles as defined in the Guide and tobacco and tobacco products do not require a certification but that food items and pesticides require a negative certification, and EPA also suggested to Customs that the Guide would become confusing in the step-by-step instructions for importers if the negative certification for food items and pesticides were to be eliminated. Moreover, while EPA advised Customs that a negative certification would not be needed if the shipment is accompanied by the appropriate form identifying the merchandise as a pesticide or as a food, food additive, drug, cosmetic or device, as is suggested in the Guide, Customs notes that this approach would not appreciably reduce the regulatory burden on importers. Accordingly, Customs believes that the suggestions of these commenters should not be adopted.

Comment:

Seven commenters requested that the regulatory text provide for a waiver of the certification requirement for small shipments, samples, low value shipments, mail shipments, and shipments imported for research and development purposes.

Customs response:

The EPA has advised Customs that automatic waivers of the certification requirement should not be provided for in the regulatory text because authority to grant waivers must remain with the EPA for consideration on a case-by-case basis; the Guide referred to in the preceding comment discussion sets forth the procedures applicable to the issuance of such waivers by the EPA. Therefore, the suggestion of these commenters should not be adopted.

Other Changes to the Regulatory Texts

In addition to the changes to the proposed regulatory text discussed above in connection with the public comments, Customs has determined that a number of other changes should be made both to the proposed text and to the present § 12.121 text based on further internal review. The principal additional change involves removal of the proposed new language dealing with entries or entry summaries processed electronically: On reconsidering this proposed text, Customs has concluded that it is generally preferable not to set forth specific electronic procedures in a narrow regulatory context but rather to cover them in the context of overall electronic procedures as those procedures are developed and implemented. In addition, the structure of the paragraphs under § 12.121 has been modified without change in substance by set-

ting forth the basic certification requirement in new paragraph (a)(1) and by covering all filing procedures (including the blanket procedure which operates as an exception to the normal entry-by-entry filing procedure) in new paragraph (a)(2). Also, language has been included in the introductory paragraph of the blanket text to clarify that use of the blanket procedure is permissible only for an imported product that conforms to the product description contained in the blanket certification filed with Customs. Finally, a number of editorial, nonsubstantive changes have been made to enhance the clarity of the regulatory text.

CONCLUSION

Accordingly, based on the comments received and the analysis of those comments and based on the additional considerations as discussed above, Customs believes that the proposed regulatory amendments should be adopted as a final rule with certain changes as discussed above and set forth below. As a consequence of the adoption of these substantive regulatory amendments, this document also includes an appropriate update of the list of information collection approvals contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities because the amendments are specifically directed toward a reduction of the regulatory burden on the public. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1515–0173. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this final rule is in § 12.121. This information is required in connection with importations of chemical substances under the Toxic Substances Control Act (TSCA) and will be used by the U.S. Customs Service to verify compliance with TSCA requirements on imported chemicals. The likely respondents are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 2 minutes per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and

suggestions for reducing this burden should be directed to the U.S. Customs Service, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 12

Customs duties and inspection, Labeling, Marking, Reporting and recordkeeping requirements.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons stated in the preamble, Parts 12 and 178, Customs Regulations (19 CFR Parts 12 and 178), are amended as set forth below.

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.118 through 12.127 also issued under 15 U.S.C. 2601 *et seq.*;

* * * * * * *

2. Section 12.121 is revised to read as follows:

§ 12.121 Reporting requirements.

(a) *Chemical substances in bulk or mixtures*—(1) *Certification required.* The importer of a chemical substance imported in bulk or as part of a mixture, or the authorized agent of such an importer, must certify either that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or that the chemical shipment is not subject to TSCA, by signing and filing with Customs one of the following statements:

> I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.
>
> I certify that all chemical substances in this shipment are not subject to TSCA.

(2) *Filing of certification*—(i) *General*. The appropriate certification required under paragraph (a)(1) of this section must be filed with the director of the port of entry before release of the shipment and, except when a blanket certification is on file as provided for in paragraph (a)(2)(ii) of this section, must appear as a typed or stamped statement:

(A) On an appropriate entry document or commercial invoice or on an attachment to that entry document or invoice; or

(B) In the event of release under a special permit for an immediate delivery as provided for in § 142.21 of this chapter or in the case of an entry as provided for in § 142.3 of this chapter, on the commercial invoice or on an attachment to that invoice.

(ii) *Blanket certifications*. A port director may, in his discretion, approve an importer's use of a "blanket" certification, in lieu of filing a separate certification for each chemical shipment, for any chemical shipment that conforms to a product description provided to Customs pursuant to paragraph (a)(2)(ii)(A) of this section. In approving the use of a "blanket" certification, the port director should consider the reliability of the importer and Customs broker. Approval and use of a "blanket" certification will be subject to the following conditions:

(A) A "blanket" certification must be filed with the port director on the letterhead of the certifying firm, must list the products covered by name and Harmonized Tariff Schedule of the United States subheading number, must identify the foreign supplier by name and address, and must be signed by an authorized person;

(B) A "blanket" certification will remain valid, and may be used, for 1 year from the date of approval unless the approval is revoked earlier for cause by the port director. Separate "blanket" certifications must be approved and used for chemical substances that are subject to TSCA and for chemical substances that are not subject to TSCA; and

(C) An importer for whom the use of a "blanket" certification has been approved must include, on the invoice used in connection with the entry and entry summary procedures for each shipment covered by the "blanket" certification, a statement referring to the "blanket" certification and incorporating it by reference. This statement need not be signed.

(b) *Chemical substances or mixtures as parts of articles*. Each importer of a chemical substance or mixture as part of an article must comply with the certification requirements set forth in paragraph (a) of this section only if required to do so by a rule or order issued under TSCA.

(c) *Facsimile signatures*. The certification statements required under paragraph (a)(1) of this section may be signed by means of an authorized facsimile signature.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB Control No.*
* * * * * * *		
§ 12.121	Approval of blanket certification under the Toxic Substances Control Act.	1515–0173
* * * * * * *		

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: December 7, 1999.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 29, 2000 (65 FR 10701)]

(T.D. 00–14)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR FEBRUARY 2000

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 00–1 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): February 21, 2000.

Australia dollar:

February 22, 2000	$0.625700
February 23, 2000	.619600
February 24, 2000	.614400
February 25, 2000	.617500
February 26, 2000	.617500

FOREIGN CURRENCIES—Variances from quarterly rates for February 2000 (continued):

Australia dollar (continued):	
February 27, 2000	$0.617500
February 28, 2000	.611600
February 29, 2000	.615500
Denmark krone:	
February 28, 2000	$0.129912
February 29, 2000	.129467
Japan yen:	
February 1, 2000	$0.009288
February 2, 2000	.009225
February 3, 2000	.009266
February 4, 2000	.009299
February 5, 2000	.009299
February 6, 2000	.009299
February 7, 2000	.009195
February 8, 2000	.009125
February 9, 2000	.009165
February 10, 2000	.009196
February 11, 2000	.009175
February 12, 2000	.009175
February 13, 2000	.009175
February 14, 2000	.009204
February 15, 2000	.009195
February 16, 2000	.009142
February 17, 2000	.009069
February 18, 2000	.009019
February 19, 2000	.009019
February 20, 2000	.009019
February 21, 2000	.009019
February 22, 2000	.009006
February 23, 2000	.009000
February 24, 2000	.009013
February 25, 2000	.009011
February 26, 2000	.009011
February 27, 2000	.009011
February 28, 2000	.009160
February 29, 2000	.009101
New Zealand dollar:	
February 1, 2000	$0.490400
February 2, 2000	.489800
February 3, 2000	.496700
February 4, 2000	.493000
February 5, 2000	.493000
February 6, 2000	.493000
February 7, 2000	.493600
February 8, 2000	.494000
February 9, 2000	.492000
February 10, 2000	.493500
February 11, 2000	.491500
February 12, 2000	.491500
February 13, 2000	.491500
February 14, 2000	.486800
February 15, 2000	.487000
February 16, 2000	.489900

FOREIGN CURRENCIES—Variances from quarterly rates for February 2000 (continued):

New Zealand dollar (continued):

February 17, 2000	$0.493700
February 18, 2000	.490900
February 19, 2000	.490900
February 20, 2000	.490900
February 21, 2000	.490900
February 22, 2000	.491700
February 23, 2000	.485500
February 24, 2000	.486700
February 25, 2000	.488200
February 26, 2000	.488200
February 27, 2000	.488200
February 28, 2000	.484600
February 29, 2000	.486500

Norway krone:

February 29, 2000	$0.119318

Switzerland franc:

February 28, 2000	$0.601866
February 29, 2000	.600060

Dated: March 1, 2000.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

RENEWAL OF THE GENERALIZED SYSTEM OF PREFERENCES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: The Generalized System of Preferences (GSP) is a renewable preferential trade program that allows the eligible products of designated developing countries to directly enter the United States free of duty. The GSP program expired on June 30, 1999, but has been renewed through September 30, 2001, effective December 17, 1999, with retroactive effect to July 1, 1999, by a provision in the Ticket To Work and Work Incentives Improvement Act of 1999. This document provides notice to importers that Customs is again accepting claims for GSP duty-free treatment for merchandise entered, or withdrawn from a warehouse, for consumption and that Customs is processing refunds on all duties paid, with interest from the date the duties were deposited, on GSP-eligible merchandise that was entered during the period that the GSP program was lapsed.

FOR FURTHER INFORMATION CONTACT: For general operational questions:

Formal entries, Leon Hayward, 202–927–9704;
Informal entries, John Considine, 202–927–0042;
Mail entries, Robert Woods, 202–927–1236;
Passenger claims, Wes Windle, 202–927–0167.

For specific questions relating to the Automated Commercial System: James Halpin, Office of Information and Technology, 703–921–7128.

Questions from filers regarding ABI transmissions should be directed to their ABI client representatives. Persons with other questions regarding this notice may contact Leon Hayward, International Agreements, 202–927–9704.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 501 of the Trade Act of 1974, as amended (19 U.S.C. 2461), authorizes the President to establish a Generalized System of Preferences

(GSP) to provide duty-free treatment for eligible articles imported directly from designated beneficiary countries for specific time periods. Pursuant to 19 U.S.C. 2465, as amended by section 1011(a) of Pub.L. 105–277, 112 Stat. 2681, duty-free treatment under the GSP program expired on June 30, 1999.

On December 17, 1999, the President signed the Ticket To Work and Work Incentives Improvement Act of 1999 (Pub.L. 106–170, 113 Stat. 1860). Section 508 of Pub.L. 106–170 pertains to the extension of duty-free treatment and the retroactive application for certain liquidations and reliquidations under the GSP. Section 508 provides that GSP duty-free treatment shall be applied to eligible articles from designated beneficiary countries that are entered, or withdrawn from warehouse, for consumption on or after July 1, 1999, through September 30, 2001. Further, regarding any entries made after June 30, 1999 through December 16, 1999, to which duty-free treatment would have applied if GSP had been in effect during that time period, any duty paid with respect to any such entry shall be refunded provided that a request for liquidation or reliquidation of that entry, containing sufficient information to enable Customs to locate the entry or to reconstruct the entry if it cannot be located, is filed with Customs by June 14, 2000 (within 180 days after the date of Pub.L. 106–170's enactment).

Recognizing the impact that retroactive renewal and consequent numerous reliquidations will have on both importers and Customs, Customs developed a mechanism to facilitate refunds (*see*, Federal Register Notice of June 4, 1997, 62 FR 30672). On January 7, 2000, Customs began processing refunds due to the recent renewal of the GSP. Customs expects the processing of refunds to take from four to eight weeks for certain formal Automated Broker Interface (ABI) entries.

DUTY-FREE ENTRY SUMMARIES

Effective December 17, 1999, filers again are entitled to file GSP-eligible entry summaries without the payment of estimated duties.

REFUNDS WITH INTEREST

A. *Formal Entries*

Customs will liquidate or reliquidate all affected entry summaries and refund any duties deposited for items qualifying for GSP and for which requests for liquidation or reliquidation are timely filed. Field locations shall not issue GSP refunds except as instructed to do so by Customs Headquarters.

If an ABI entry summary was filed with payment of estimated duties using the Special Program Indicator (SPI) for the GSP (the letter "A") as a prefix to the tariff number, no further action by the filer is required; filings with the SPI "A" will be treated as conforming requests for refunds. If an ABI entry summary was filed with payment of estimated duties without the use of the SPI "A" as a prefix to the tariff number, a refund of duties deposited must be requested in writing as described below for non-ABI entry summaries.

Non-ABI filers must request a refund in writing from the Port Director at the port of entry by June 14, 2000, regardless if they previously designated a refund on the Customs Form 7501 by using the SPI "A" code. The letter may cover either single entry summaries or all entry summaries filed by an individual filer at a single port. To expedite refunds, Customs recommends the following information be included in each letter:

1. A statement requesting a refund, as provided by section 508 of the Ticket To Work and Work Incentives Improvement Act of 1999;
2. An enumeration of the entry numbers and line items for which refunds are requested; and
3. The amount requested to be refunded for each line item and the total amount owed for all entry summaries.

Interest on duties deposited will be paid, pursuant to section 505 of the Tariff Act of 1930, as amended (19 U.S.C. 1505), based on the quarterly Internal Revenue Service interest rates used to calculate interest on refunds of Customs duties as follows:

	July 1, 1999—December 16, 1999
Corporate Rate	7%
Non-Corporate Rate	8%

B. *Informal Entries Filed via ABI*

Refunds with interest on informal entries filed via ABI on a Customs Form 7501 with the SPI "A" will be processed in accordance with the procedures discussed above.

C. *Mail Entries*

The addressees on mail entries must request a refund of GSP duties and return it, along with a copy of the CF 3419A, to the appropriate International Mail Branch (address listed on bottom right hand corner of CF 3419A). It is essential that a copy of the CF 3419A be included, as this will be the only means of identifying whether GSP products have been entered and estimated duties and fees have been paid.

D. *Baggage Declarations and Non-ABI Informals*

If travelers/importers wrote a statement directly on their Customs declarations (CF 6059B) or informal entries (CF 363 or CF 7501) requesting a refund, no further action by the traveler/importer will be required; the statement will be treated as a conforming request for a refund. Failure to request a refund in this manner does not preclude a traveler/importer from otherwise making a timely request in writing, as described above for non-ABI filers.

Dated: February 25, 2000.

ROBERT J. MCNAMARA,
Acting Assistant Commissioner,
Field Operations.

[Published in the Federal Register, March 2, 2000 (65 FR 11367)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 2–2000)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of January 1999 follow. The last notice was published in the CUSTOMS BULLETIN on February 16, 2000.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: February 28, 2000.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0000001	20000111	20200111	CAT IN THE BAG	PRO-MOTIONS NOVELTY COMPANY INC.	N
COP0000002	20000111	20200111	SILHOUETTE OF A VEILED WOMAN HOLDING A SMALL CHILD	OTC INTERNATIONAL LIMITED	N
COP0000003	20000111	20200111	SILHOUETTE OF A SINGLE ANGEL WITH HANDS IN PRAYER	OTC INTERNATIONAL LIMITED	N
COP0000004	20000111	20200111	SILHOUETTE OF A WOMAN HOLDING A CHILD CARVED INTO THE	OTC INTERNATIONAL LIMITED	N
COP0000005	20000111	20200111	GAME BOY COLOR	NINTENDO OF AMERICA INC.	N
COP0000006	20000112	20200112	ABIDING BEARS: MOTHER & DAUGHTER	YOUNG'S INC.	N
COP0000007	20000112	20200112	ABIDING BEARS: BEAR FISHING	YOUNG'S INC.	N
COP0000008	20000112	20200112	ABIDING BEARS: MINI BEARS (ASSORTMENT OF 6)	YOUNG'S INC.	N
COP0000009	20000112	20200112	ABIDING BEARS: BEAR ANGEL WITH CROSS	YOUNG'S INC.	N
COP0000010	20000118	20200118	LAS VEGAS	UNIQUE MEDIA INCORPORATED	N
COP0000011	20000118	20200118	MOUNTAIN BIRCH (REGAL PLANK)	CONGOLEUM CORPORATION	N
COP0000012	20000127	20200127	PLUMERIA LEI #11400800	TRADE WEST INC.	N
COP0000013	20000127	20200127	COTILLION (EVOLUTION)	CONGOLEUM CORPORATION	N
SUBTOTAL RECORDATION TYPE 13					
TMK0000001	20000105	20030511	CHOCOLATE BODY PAINT	TOM & SALLY'S HANDMADE CHOCOLATE	N
TMK0000002	20000110	20090601	CIGAR SHAPED CONTAINER	NADIM KHOURI KLINK	N
TMK0000003	20000111	20090615	DESERT DAWGS	JEFF GUERTIN	N
TMK0000004	20000111	20031109	DOVER HOUSE	RED DIAMOND INC.	N
TMK0000005	20000111	20090831	RAMDEV	RAJA FOODS L.L.C.	N
TMK0000006	20000112	20090907	WS (STYLIZED)	WROUGHT WASHER MFG. INC.	N
TMK0000007	20000112	20090606	W3 (STYLIZED)	WROUGHT WASHER MFG. INC.	N
TMK0000008	20000112	20091019	E-Z ARM	AIRFLOW SYSTEMS INC.	N
TMK0000009	20000112	20071003	CHICKEN OF THE SEA	TRI-UNION SEAFOOD COMPANY, INC.	N
TMK0000010	20000112	20080902	MERMAID DESIGN	TRI-UNION SEAFOOD COMPANY, INC.	N
TMK0000011	20000112	20061123	NEW BALANCE	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000012	20000112	20031213	NEW BALANCE	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000013	20000112	20070517	FLYING NB	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000014	20000112	20031213	FLYING NB	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000015	20000112	20041204	FLYING N	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000016	20000112	20050625	N SADDLE	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000017	20000112	20080725	N SADDLE	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000018	20000112	20061123	HUSH PUPPIES	WOLVERINE WORLD WIDE, INC.	N
TMK0000019	20000112	20080616	HUSH PUPPIES	WOLVERINE WORLD WIDE, INC.	N
TMK0000020	20000112	20090522	HUSH PUPPIES	WOLVERINE WORLD WIDE, INC.	N
TMK0000021	20000112	20090914	FOOTHOLDS	WOLVERINE WORLD WIDE, INC.	N
TMK0000022	20000112	20090707	SIOUX MOX	WOLVERINE WORLD WIDE, INC.	N
TMK0000023	20000112	20000403	BOBBY JONES(AND DESIGN	JONESHEIRS, INC.	N
TMK0000024	20000114	20090601	FIRST SWING	FIRST SWING INC.	N
TMK0000025	20000114	20070722	PROMETHEUS	PROMETHEUS INTERNATIONAL INC.	N
TMK0000026	20000118	20091226	ICE CHILLER	BALTIMORE AIRCOIL COMPANY INC.	N
TMK0000027	20000118	20061202	MANDOGUITAR	JACK CHARLES MEUSSDORFER	N
TMK0000028	20000118	20030209	SANTIAGO 1541	VINA UNDURRAGA S.A.	N
TMK0000029	20000118	20090427	TAWARA RICE	DAIFUKU TRADING CORPORATION	N
TMK0000030	20000120	20050209	GAMASTAN	BAYER CORPORATION	N
TMK0000031	20000120	20041110	GAMIMUNE	BAYER CORPORATION	N
TMK0000032	20000120	20071003	HYPER-TET	BAYER CORPORATION	N
TMK0000033	20000120	20051014	HYPERAB	BAYER CORPORATION	N

02/01/00 U.S. CUSTOMS SERVICE PAGE 7
10:03:56 IPR RECORDATIONS ADDED IN JANUARY 2000 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0000034	20000120	20010407	HYPERHEP	BAYER CORPORATION	N
TMK0000035	20000120	20020625	HYPRHO	BAYER CORPORATION	N
TMK0000036	20000120	20160203	KOATE	BAYER CORPORATION	N
TMK0000037	20000120	20020307	KONYNE	BAYER CORPORATION	N
TMK0000038	20000120	20000603	PLASBUMIN	BAYER CORPORATION	N
TMK0000039	20000120	20080812	PLASMANATE	BAYER CORPORATION	N
TMK0000040	20000120	20061206	PLASMANATE	BAYER CORPORATION	N
TMK0000041	20000120	20030216	THROMBATE III	BAYER CORPORATION	N
TMK0000042	20000120	20010804	GLUCOMETER	BAYER CORPORATION	N
TMK0000043	20000120	20040531	GLUCOMETER ELITE	BAYER CORPORATION	N
TMK0000044	20000120	20031130	GLUCOMETER ELITE	BAYER CORPORATION	N
TMK0000045	20000120	20060522	CLINISTIX	BAYER CORPORATION	N
TMK0000046	20000120	20090106	DIASTIX	BAYER CORPORATION	N
TMK0000047	20000120	20071231	KETOSTIX	BAYER CORPORATION	N
TMK0000048	20000120	20020307	KETO-DIASTIX	BAYER CORPORATION	N
TMK0000049	20000121	20000721	DUNHAM'S	NEW BALANCE ATHLETIC SHOE, INC.	N
TMK0000050	20000121	20091026	SENSORY MARK - NO DRAWING	ZAO ELORG AKA ELORG CORPORATION	N
TMK0000051	20000121	20081020	MECCA	INTERNATIONAL NEWS, INC.	N
TMK0000052	20000121	20090831	DNM	INTERNATIONAL NEWS, INC.	N
TMK0000053	20000121	20091019	STUSSY	STUSSY, INC.	N
TMK0000054	20000131	20030518	SHIMANO	SHIMANO INC.	N
TMK0000055	20000131	20200717	SHIMANO	SHIMANO INC.	N

SUBTOTAL RECORDATION TYPE 55

TOTAL RECORDATIONS ADDED THIS MONTH 68

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 1, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF VALERIAN HERBAL TABLETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of classification ruling letter and revocation of treatment relating to the classification of valerian herbal tablets.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter, NY A82970, dated May 10, 1996, pertaining to the tariff classification of valerian herbal tablets and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before April 14, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–927–1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of valerian herbal tablets. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) A82970, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY A82970, dated May 10, 1996, the classification of a product commonly referred to as valerian herbal tablets was determined to be in heading 3004.90.9030, HTSUS. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY A82970, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963749 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: February 25, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, May 10, 1996.

CLA–2–21:RR:NC:FC:228 A82970
Category: Classification
Tariff No. 2106.90.9998,
3004.90.9030 and 3304.99.5000

MR. MIKE NACACHIAN
NAKA SALES LTD.
53 Queens Plate Drive Unit #3
Etobicoke, Ontario Canada M9W 6P1

Re: The tariff classification of an herbal oil and food supplements from Germany and Canada.

DEAR MR. NACACHIAN:

In your letter dated April 15, 1996 you requested a tariff classification ruling.

Five samples, submitted with your letter, were examined and disposed of. Artichoke Herbal Pills are white discs said to be composed of artichoke powder and dry artichoke extract. Supr-IM Formula are clear gelatin capsules, filled with a dry powder, said to be a mixture of five different herbs. Both products are put up in plastic containers, with a recommended dosage of one to two capsules or pills, three times a day. Chol-Guard Fibre Drink is a dry, brown substance, in the form or small, thin, fragile flakes. The stated ingredients are high-pectin apple extract, apple fiber, and lemon. According to package directions, one tablespoon of this product is to be mixed with water, fruit juice or milk, and, after allowing the mixture to stand for one to two minutes, drunk. It is recommended that the product be taken two to three times a day. Valerian Herbal Tablets are white discs said to

contain valerian root extract and hop extract. This product is described as a sleeping aid, with a recommended dosage of two tablets shortly before going to bed. Dr. Weindrich's 101 Liquid Herbs is a pale green liquid put up in a glass bottle containing 3.4 fluid ounces. It is described as a concentrated, multi-purpose massage oil, based on herbs, roots, berries, and other plant extracts.

The applicable subheading for the Artichoke Herbal Pills, Supr-IM Formula, and Chol-Guard Fibre Drink will be 2106.90.9998, Harmonized Tariff Schedule of the United States (HTS), which provides for food preparations not elsewhere specified or included * * * other * * * other * * * other. The rate of duty will be 8.8 percent ad valorem.

The applicable subheading for the Valerian Herbal Tablets will be 3004.90.9030, HTS, which provides for medicaments * * * consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale * * * other * * * other * * * medicaments primarily affecting the central nervous system * * * anticonvulsants, hypnotics and sedatives. The rate of duty will be free.

The applicable subheading for Dr. Weindrich's 101 Liquid Herbs will be 3304.99.5000, HTS, which provides for beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen or sun tan preparations * * * other * * * other * * * other. The rate of duty will be 2.9 percent ad valorem.

These products may be subject to restrictions imposed by the United States Food and Drug Administration (FDA). For additional information, it is suggested you contact the FDA at 5600 Fishers Lane, Rockville, MD 20857, telephone number (202) 443–3380.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 212–466–5760.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963749ptl
Category: Classification
Tariff No. 2106.90.9998

MR. MIKE NACACHIAN
NAKA SALES LTD.
53 Queens Plate Drive, Unit #3
Etobicoke, Ontario, Canada M9W 6P1

Re: Valerian Herbal Tablets; NY A82970 Modified; HQ 083000, 952278, 962335, 953679.

DEAR MR. NACACHIAN:

In response to your letter dated April 15, 1996, the Director, Customs National Commodity Specialist Division, New York, issued you New York Ruling Letter (NY) A82970 on May 10, 1996, which addressed the tariff classification of several articles under the Harmonized Tariff Schedule of the United States (HTSUS). That ruling classified Valerian Herbal Tablets in subheading 3004.90.9030, HTSUS, which provides for medicaments * * * consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale * * * other * * * other * * * medicaments primarily affecting the central nervous system * * * anticonvulsants, hypnotics and sedatives. We have reviewed this ruling and determined that NY A82970 incorrectly classified the Valerian Herbal Tablets. Classifications of the other articles in that ruling are not affected by this ruling.

Facts:

The merchandise under consideration, Valerian Herbal Tablets, is described in the ruling request as being a "health food supplement for human use". The Valerian Herbal Tablets are white disks said to contain valerian root extract and hop extract. The product is described as a sleeping aid, with a recommended dosage of two tablets shortly before going to bed.

Issue:

What is the classification of Valerian Herbal Extract in tablet form?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The headings under consideration are as follows:

1302	Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products:
	Vegetable saps and extracts:
1302.19	Other:
	Ginseng; substances having anesthetic, prophylactic or therapeutic properties:
* * * * * * *	
1302.19.40	Other.
1302.19.4040	Other.
2106	Food preparations not elsewhere specified or included:
* * * * * * *	
2106.90	Other:
	Other:
	Other:
	Other:
	Other:
	Other:
2106.90.9998	Other
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale:
* * * * * * *	
	Other
3004.90	Other
* * * * * * *	
	Medicaments primarily affecting the central nervous system:
* * * * * * *	
3004.90.9030	Anticonvulsants, hypnotics and sedatives.

We first consider heading 1302, HTSUS, for classification of the merchandise, based upon the language of the heading which reads: "Vegetable saps and extracts * * * whether or not modified, * * *." However, the ENs to heading 1302 state that "The vegetable saps and extracts of this heading are generally raw materials for various manufactured products. They are **excluded** from the heading when, because of the addition of other substances, they have the character of food preparations, medicaments, etc." Therefore, it is

not only the addition of substances to extracts, but, rather the condition of the final product that is determinative of classification. In this article, not only has hop extract been added, but the valerian extract has been processed into tablet form. Thus, the article can no longer be considered a raw material and is not eligible for classification in heading 1302.

With regard to classification in heading 3004, HTSUS, Customs notes that it has consistently rejected the contention that herbal products are medicaments of heading 3004, HTSUS, stating that, in accordance with the language of EN 30.04, if a product contains parts of plants mixed with other substances and is used to promote general health and well-being it is not a medicament of heading 3004, HTSUS, but rather a food supplement of heading 2106, HTSUS. Customs has also maintained that 3004 excludes products which are put up for the purpose of maintaining health or well-being, but which have no indication as to use for the prevention or treatment of any disease or ailment. See Headquarters Ruling Letters (HQ) 083000, issued September 19, 1990; 952278, dated January 26, 1993 and 962335, dated February 3, 2000. No evidence has been provided that the Valerian Herbal Tablets are intended to be used for therapeutic or prophylactic purposes, a requirement for classification in heading 3004, HTSUS. Accordingly, we cannot classify the article in heading 3004.

In HQ 953679, dated February 3, 1994, Customs ruled that Valerian Root Extract described as "a capsule of valeric acids in a base of wild East Indian Valerian root" was classified in heading 2106, HTSUS. The subject Valerian Herbal extract is a similar product to the article in that ruling.

For the above reasons, the Valerian Herbal Extract is properly classified in subheading 2106.90.9998, HTSUS, as a food preparation not elsewhere specified or included, * * *, other.

Holding:

Valerian Herbal Extract in tablet form is classified in subheading 2106.90.9998, HTSUS, which provides for food preparations not elsewhere specified or included: other: other: other: other: other: other.

NY A82970, dated May 10, 1996, is modified in accordance with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A TEXTILE PIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a classification ruling letter and treatment relating to the classification of certain textile gift box brooches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain gift box brooches and revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before April 14, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Textile Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927–2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provi 'e the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain gift box brooches. Although in this notice Customs is specifically referring to one ruling, Headquarters Ruling Letter (HQ) 961833, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Cus-

toms previous interpretation of the Harmonized Tariff Schedule. Any person with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In HQ 961833, dated May 19, 1999, the classification of certain textile gift box brooches was determined to be in heading 7117, HTSUS, which provides for imitation jewelry. This ruling letter is set forth in "Attachment A" to this document. Customs has had a chance to review the classification of this merchandise and has determined that although the analysis regarding consideration of heading 9505 was correct, the classification of this merchandise in heading 7117, HTSUS, is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQ 961833, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963452 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: February 25, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, May 19, 1999.

CLA-2 RR:CR:GC 961833 MMC
Category: Classification
Tariff No. 7117.90

MR. LOUIS SHOICHET
TOMPKINS & DAVIDSON
ONE ASTOR PLAZA
1515 Broadway
New York, NY 10036

Re: Gift Box Brooches.

DEAR MR. SHOICHET:

This is in reference to your August 21, 1997, ruling request on behalf of Avon Products, Inc., concerning the classification of textile Gift Box Brooches under the Harmonized Tar-

iff Schedule of the United States (HTSUS). A sample has been forwarded for our review. We regret the delay in responding.

Facts:

The samples are two square brooches decorated like small wrapped boxes. The "box" portion of the brooch is formed by a 1 inch square piece of foam covered by either gold or silver toned polyester fabric and a "bow"-shaped green textile ribbon and textile rose. This portion is then attached to a metal pin.

Issue:

Whether the Gift Box Brooches are classifiable as imitation jewelry, under heading 7117, HTSUS or as a "festive article" under heading 9505, HTSUS.

Law and Analysis:

Classification under the HTSUS, is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The headings under consideration are as follows:

7117	[i]mitation jewelry
9505	[f]estive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof

In *Midwest of Cannon Falls, Inc. v. United States,* Court, 122 F.3d 1423 (Fed. Cir. 1997) (hereinafter *Midwest),* the Court addressed the scope of heading 9505, HTSUS, specifically, the class or kind "festive articles." It then applied its conclusions to 29 specific articles to determine whether they were included within the scope of the class "festive articles." This application provided new guidelines for the classification of "festive articles." In general, merchandise is classifiable in heading 9505, HTSUS, as a "festive article" when the article, *as a whole:*

1. Is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal;
2. Functions primarily as a decoration or functional item used in celebration of and for entertainment on a holiday; and
3. Is associated with or used on a particular holiday.

Based on a review of the *Midwest* articles, Customs is of the opinion that the court has included within the scope of the class "festive articles" decorative household articles which are representations of an accepted symbol for a recognized holiday and utilitarian/functional articles if such utilitarian articles are a three dimensional representation of an accepted symbol for a recognized holiday. See 32 CUSTOMS BULLETIN 2/3, dated January 21, 1998.

A brooch is defined in the Jeweler's Dictionary, 3rd Ed. 1976, as: "[a] piece of jewelry to be worn pinned to clothing, as at the neck or shoulder, on the breast or hat, or in the hair." The American Heritage Dictionary 2nd College Edition, 1985, defines a brooch as a "[l]arge decorative pin or clasp."

The subject brooches are articles of personal adornment. *Midwest* did not include within the scope of heading 9505, HTSUS, articles of personal adornment. As such, the heading does not describe the brooches.

Notes 9 and 11 to Chapter 71, HTSUS, state, in pertinent part, that the scope of the term "imitation jewelry" includes any small objects of personal adornment (gem-set or not) such as, bracelets, necklaces, brooches, earrings, watch chains, fobs, pendants, etc., not incorporating pearls, precious metal or precious or semiprecious stones. The subject brooches meet this definition. As such, they are clearly described by heading 7117, HTSUS, specifically subheading 7117.90, which provides for other imitation jewelry. Classification of the article at the 8 digit subheading level will depend upon the value of the articles per dozen pieces or parts.

Holding:

The Gift Box Brooches are classifiable in subheading 7117.90, HTSUS, which provides for other imitation jewelry. Classification of the article at the 8 digit subheading level will depend upon the value of the articles per dozen pieces or parts.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 963452 jb
Category: Classification
Tariff No. 6217.10.9530

LOUIS SHOICHET, ESQ.
TOMPKINS & DAVIDSON
ONE ASTOR PLAZA
1515 Broadway
New York, NY 10036

Re: Revocation of HQ 961833; classification of textile Gift Box Brooches.

DEAR MR. SHOICHET:

On May 19, 1999, this office issued to you Headquarters Ruling Letter (HQ) 961833, classifying merchandise referred to as textile "Gift Box Brooches" in heading 7117, Harmonized Tariff Schedule of the United States (HTSUS), in the provision for imitation jewelry. This letter is to inform you that upon review of that ruling we have determined that classification of that merchandise in heading 7117, HTSUS, is in error. The correct classification for this merchandise is in heading 6217, HTSUS, as an other made-up clothing accessory, pursuant to the analysis which follows below.

Facts:

The subject merchandise consists of two square brooches decorated to represent small wrapped gift boxes. The "box" portion of the brooch is formed by a one inch square piece of foam covered by either gold or silver toned woven polyester fabric and a "bow"-shaped green textile ribbon and textile rose. This portion is then attached to the metal pin.

There is a discussion in the law and analysis portion of HQ 961833 regarding the possibility of heading 9505, HTSUS, (which provides for, among other things, "festive articles"), as one of the headings meriting consideration with respect to the classification of this merchandise. Therein, HQ 961833 addresses the scope of *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423 (Fed. Cir. 1997) and concludes that *Midwest* did not include within the scope of heading 9505, HTSUS, "articles of personal adornment." As this accurately reflects Customs position with respect to the classification of this merchandise in heading 9505, HTSUS, this portion of the analysis will not be repeated here. This letter will only address itself to an analysis of heading 6217, HTSUS, and heading 7117, HTSUS.

Issue:

What is the proper classification for the merchandise at issue?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the rules of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

There are two plausible classifications for the subject merchandise, that is, heading 7117, HTSUS, which provides for, *inter alia*, imitation jewelry and heading 6217, HTSUSA, which provides for, *inter alia*, other made up clothing accessories. Note 3(g) to chapter 71, HTSUS, states that this chapter does not cover goods of section XI (textiles and textile articles). As the subject brooches are composed in part of textile materials, we must determine whether they fall within the exclusionary language set forth in Note 3(g) to chapter 71, HTSUS.

General Rule of Interpretation (GRI) 3 states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b). Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The EN to GRI 3(b) state:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

As we stated in HQ 080498, dated December 28, 1989,

> The provision for jewelry in subheading 7117.90.5000, HTSUSA, cannot be looked at in a vacuum. Certainly, the limitation placed on that subheading by Legal Note 3(f) to that chapter which excludes textile articles from classification thereunder makes it impossible to conclude that the specificity requirements of GRI 3(a) control classification of the bar pin. Inasmuch as classification cannot be determined by the application of GRI 3(a), we must resort to GRI 3(b)* * *.

In the case of the subject merchandise, the textile component clearly provides the brooches with their essential character. It is the ornamentation provided by the textile material, in the shape of the decorative "box", which provides this merchandise with its shape and saleability.

The EN to heading 6217, HTSUSA, state, in pertinent part:

> This heading covers made up textile clothing accessories, **other than** knitted or crocheted, not specified or included in other headings of this Chapter or elsewhere in the Nomenclature. The heading also covers parts of garments or of clothing accessories, not knitted or crocheted, **other than** parts of articles of **heading 62.12**.

The heading covers, *inter alia*:

> (8) **Labels, badges, emblems, "flashes" and the like** (**excluding** embroidered motifs of **heading 58.10**) made up **otherwise** than by cutting to shape or size. (When made up only by cutting to shape or size these articles are **excluded—heading 58.07**.)

Customs has classified similar textile pins in the past. Textile pins have consistently been classified in the appropriate provisions in heading 6217, HTSUSA, or heading 6117, HTSUSA, as other made up clothing accessories. Similar to the idea of "badges" which are affixed to clothing by a bar pin, the metal bar pins on the textile pins enable them to be affixed to garments and thus considered accessories to garments. *See also* HQ 080498, dated December 28, 1989, HQ 960401, dated July 16, 1997, and HQ 958167, dated August 30, 1995, classifying similar merchandise in heading 6217, HTSUSA.

Accordingly, the subject merchandise is properly classified in heading 6217, HTSUS.

Holding:

The subject textile "Gift Box Brooches" are classified in subheading 6217.10.9530, HTSUSA, which provides for other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: accessories: other: other: of man-

made fibers. The applicable general column one rate of duty is 15 percent *ad valorem* and the quota category is 659.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF A RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TEXTILE JEWELRY POUCHES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and treatment relating to the tariff classification of textile jewelry pouches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of textile jewelry pouches and any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before April 14, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW. Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textile Branch (202) 927–1695.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of certain textile jewelry pouches.

Although this notice is specifically referring to one ruling, New York Ruling Letter (NY), C89894, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NY) C89894, dated November 13, 1998, three textile pouches were classified under subheading 4202.32.9550, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for: "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera

cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or textile materials: With outer surface of textile materials: Other: Other: Of man-made fibers." Ruling C89894 is set forth as "Attachment A" to this document. It is Customs view that the pouches in question are not of a kind normally carried in the pocket or handbag. The pouches would provide little in the way of protection and portability, therefore they lack the essential characteristics running through the heading 4202 exemplars. We therefore believe that the pouches should have been classified in subheading 6307.90.9989, HTSUSA, as "Other made up articles, including dress patterns: Other: Other: Other: Other: Other."

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY C89894, and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 962466 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: February 22, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, November 13, 1998.

CLA–2–42:RR:NC:3:341 C89894
Category: Classification
Tariff No. 4202.32.9550

MR. JOE SCHMID
JS INTERNATIONAL
8621 Bellanca Ave.
Los Angeles, CA 90045

Re: The tariff classification of purses of textile materials from China.

DEAR MR. SCHMID:

In your letter dated June 29, 1998 you requested a classification ruling. The request is on behalf of Jewelpak Corporation.

You have submitted samples of three drawstring purses which are manufactured of a woven textile material which is coated on the exterior with flocking of 100 percent acrylic fibers. The woven fabric is 60 percent, by weight, of cotton fibers, and 40 percent of polyester fibers. Each purse has a drawstring closure and is of the same class or kind as a coin purse. You have indicated that the purses will sold with articles of jewelry although the articles are not specifically dedicated for use with jewelry and are a generic purse designed to contain small person artcles.

The applicable subheading for the will be 4202.32.9550, Harmonized Tariff Schedule of the United States (HTS), which provides, in part, for articles of a kind normally carried in the pocket or handbag of textile materials, with outer surface of textile materials, of manmade fibers. The duty rate will be 19 percent ad valorem.

Goods classified within tariff number 4202.32.9550 fall within textile category designation 670. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist 341 at 212–466–5893.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA.–2 RR:CR:TE 962466 SG
Category: Classification
Tariff No. 6307.90.9989

PETER J. FITCH, ESQ
FITCH, KING AND CAFFENTZIZ
116 John Street
New York, NY 10038

Re: Textile Jewelry Pouches; Revocation of NY C89894.

DEAR MR. FITCH:

This letter is in response to your request of December 14, 1998, on behalf of your client, Jewelpak Corporation, for reconsideration of New York Ruling Letter (NY) C89894, dated November 13, 1998, wherein certain textile pouches were classified under heading 4202, Harmonized Tariff Schedule of the United States (HTSUS). Samples were submitted with the request.

Facts:

The merchandise that was the subject of NY C89894, consists of three pouches which are identical except for their size. The pouches measure 2 inches in width and 2 inches in length, 2¾ inches in width and 3¼ inches in length, and 4 inches in width and 5¼ inches in length, respectively. The pouches are closed on three sides; the remaining side is open and has a drawstring closure. The pouches are constructed of woven textile material, which is coated on the exterior with flocking of 100 percent acrylic fibers. "Flock" is a textile material defined in heading 5601, HTS, as "textile fibers, not exceeding 5 millimeters in length." The woven fabric is 60 percent, by weight, of cotton fibers, and 40 percent of polyester fibers. The pouches are not lined and have no internal or external pockets or special fittings. They are capable of holding a variety of small items. The pouches' opening at the top is drawn closed when the ends of a thin, braided string are pulled in opposite directions. The intended use for these pouches is to hold jewelry.

In NY C89894 Customs ruled that the pouches were classified in subheading 4202.32.9550, HTSUSA, as an article of a kind normally carried in the pocket or handbag, of textile materials, with outer surface of textile materials, of man-made fibers.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Pouches of textile materials similar to the subject merchandise have been classified in both headings 4202 and 6307, HTSUS, depending upon their construction and the purpose(s) for which they are designed. Pouches classified outside of heading 4202, HTSUS, are generally those considered not specially designed to contain particular item(s), or not adequately constructed to sustain repeated use.

Heading 4202, HTSUS, provides for "Trunks, suitcases, vanity cases * * * spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags * * * wallets, purses, map cases, cigarette cases, tobacco pouches * * * bottle cases, jewelry boxes * * * and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper.

The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 4202 suggest that the expression "similar containers" in the first part of the heading "includes hat boxes, camera accessory cases, cartridge pouches, sheaths for hunting or camping knives, portable tool boxes or cases, specially shaped or internally

fitted to contain particular tools with or without their accessories, etc." With regard to the second part of heading 4202, the EN indicate that the expression "similar containers" includes "note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and jewelry rolls, shoe-cases, brush-cases, etc."

In *Totes, Incorporated v. United States*. 18 Ct. Int'l. Trade 919, 865 F. Supp. 867 (1994), aff'd, 69 F.3d 495 (Fed. Cir. 1995), the Court of International Trade held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. With respect to the broad reach of the residual provision for "similar containers" in heading 4202 by virtue of the rule of *ejusdem generis*, the Court found that the rule requires only that the imported merchandise possess the essential character or purpose running through all of the enumerated exemplars.

Upon examination of the submitted pouches, it is apparent from the construction that the subject textile pouches are unsubstantial and would provide little in the way of protection and portability. Despite the samples' outer surface flocking, the constituent fabric is fairly flimsy and the pouches have no lining for added protection of the contents. The braided string by which the pouches would be carried is also quite thin. The featureless interiors of the sample pouches offer no means by which their contents would be organized. Aside from their being suitable for the storage of contents, the pouches lack the essential characteristics running through the heading 4202 exemplars enumerated above.

Heading 6307, HTSUS, covers other made up textile articles. The EN to heading 6307 indicate that the heading covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature. The EN indicate that the heading includes, among other things, domestic laundry or shoe bags and similar articles. The EN suggest that the heading excludes, among other goods, travel goods (suit-cases, rucksacks, etc.), shopping-bags, toilet-cases, etc., and all similar containers of heading 4202.

In Headquarters Ruling Letter (HQ) 959563, issued October 5, 1998, this office classified a textile drawstring pouch (for toiletries) in subheading 4202.92.3030 (now 4202.92.3031), HTSUSA. Although similar to the subject pouches in dimensions and in its lack of pockets or fittings, that pouch was constructed with three layers of material, i.e., an exterior layer of a ribbed polyester fabric, a middle layer batting of man-made textile material, and an inner lining composed of vinyl. We found that the item was of a strong and durable construction, and that its purpose was to securely carry toiletries and protect them against breakage. (See also HQ 956719, issued July 21, 1994.)

In HQ 960757, issued August 26, 1997, two drawstring pouches similar in features and construction to the subject articles were classified. The pouches were composed of a cotton/nylon woven fabric blend, and they possessed neither lining nor any additional pockets or fittings. The larger of the two pouches measured approximately five inches by seven inches. After finding that the constituent fabric was fairly flimsy and that the pouches would provide their contents little in the way of protection or portability, we classified the articles in subheading 6307.90.9989, HTSUSA.

In light of the sample pouches' weak construction and the lack of features which would provide protection or portability to their contents, we find that the pouches at issue here are classified in subheading 6307.90.9989, HTSUSA. (See also HQ 960206, issued March 17, 1999; HQ 957473, issued March 6, 1995; HQ 956234, issued November 14, 1994; HQ 956425, issued July 28, 1994; HQ 955012, issued October 28, 1993; HQ 089851, issued July 29, 1991; and 086852, issued May 10, 1990.)

Holding:

The subject textile pouches are classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other: Other." The general column one duty rate is 7 percent ad valorem.

NY C89894 is revoked to conform classification of this merchandise in heading 6307, HTSUS.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

[PUBLIC VERSION]

(Slip Op. 99–144)

LG SEMICON CO., LTD., AND LG SEMICON AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR

Court No. 98–10–03076

(Dated December 30, 1999)

Kaye, Scholer, Fierman, Hays, & Handler, LLP (Michael P. House and *Raymond Paretzky)* for plaintiffs LG Semicon Co., Ltd. and LG Semicon America, Inc.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Kenneth S. Kessler*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Patrick V. Gallagher, Jr.)*, of counsel, for defendant.

Hale and Dorr, LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and *Cris R. Revaz)* for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, *Judge:* In this action, the Court reviews the United States Department of Commerce's ("Commerce") *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order*, 63 Fed. Reg. 50,867 (Sept. 23, 1998), *as amended*, 63 Fed. Reg. 56,906 (Oct. 23, 1998)*("Final Results")*. Plaintiffs LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively "LG Semicon") complain that in the *Final Results* Commerce applied a "knew or should have known" standard to determine that third country sales should be treated as U.S. sales for purposes of calculating a dumping margin. According to plaintiffs, the proper test should be actual knowledge. Plaintiffs also argue that regardless of the standard applied, Commerce's determination is not supported by substantial evidence.

The Court exercises jurisdiction to review this motion for judgment upon the agency record pursuant to 28 U.S.C. § 1581(c)(1994). The Court sustains Commerce's *Final Results*.

I.

BACKGROUND

On April 22, 1992, Micron Technology, Inc. ("Micron"), the defendant-intervenor in the instant action, filed an antidumping petition alleging that Dynamic Random Access Memory Semiconductors ("DRAMs") imported from Korea were being sold in the United States at less than fair market value. After an investigation, Commerce published, on May 10, 1993, an antidumping duty order covering such imports. *Antidumping Duty Order and Amended Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 27,520 (May 10, 1993).

In response to requests from both domestic and foreign producers, Commerce initiated the fourth antidumping duty administrative review of the order on July 19, 1997. *Initiation of Antidumping and Countervailing Duty Administration Reviews and Request for Revocation in Part*, 62 Fed. Reg. 33,394 (July 19, 1997). The review covered the period May 1, 1996, through April 30, 1997. *Id.* On March 3, 1998, Commerce published its preliminary results of the fourth review. *Dynamic Random Access Memory Semiconductors of one Megabit or Above From the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent not to Revoke Order*, 63 Fed. Reg. 11,411 (Mar. 9, 1998)*("Preliminary Results")*.

In the *Preliminary Results*, Commerce "determined that a number of sales LG [Semicon] had reported as being to a third country were actually sales to the United States." *Id.* at 11,412. As a result, Commerce used "both the reported and the unreported sales to the United States" to calculate LG Semicon's dumping margin. *Id.* LG Semicon challenged the *Preliminary Results*. It claimed it had no knowledge that its third country sales, which consisted of DRAMs sold to a foreign business, would be exported to the United States. *See* App. to Pls. LG Semicon Co., Ltd. and LG Semicon America, Inc.'s Reply Br. in Supp. of Pls.' Mot. for J. upon the Agency R. ("Pls.' App."), at Confidential Record ("C.R.") 1935 (Case Br. of LG Semicon Co., Ltd. and LG Semicon America, Inc. (Apr. 28, 1998), 26–27).

Nonetheless, Commerce maintained in the *Final Results* that "a number of sales that LG reported as third-country sales were actually [unreported] sales to the United States." 63 Fed. Reg. at 50,868. It determined "that at the time LG made these sales it knew, or should have known, that the DRAMs were destined for consumption in the United States." *Id.* Thus, in calculating LG Semicon's dumping margin of 9.28%, Commerce included LG Semicon's sales to the foreign business. *See id.*

II.

STANDARD OF REVIEW

Commerce's *Final Results* will be sustained if they are supported by substantial evidence on the record and are otherwise in accordance with the law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

To determine whether Commerce's interpretation of a statute is in accordance with law, the Court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first directs the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. The Court first looks to the statute's text to ascertain "Congress's purpose and intent." *Timex V.I., Inc. v. United States*, ____ Fed. Cir. (T) ____, ____, 157 F.3d 879, 881 (1998) (citing *Chevron*, 467 U.S. at 842–43 & n.9). If the plain language of the statute is not dispositive, the Court will then consider the statute's structure, canons of statutory interpretation, and legislative history. *See id.* at 882 (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 470–80 (1997)); *Chevron* 467 U.S. at 859–63; *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)). If Congress's intent is unambiguous, the Court must give it effect. *See id.*

If the statute is either silent or ambiguous on the question at issue, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Thus, the second prong of the *Chevron* test directs the Court to consider the reasonableness of Commerce's interpretation. *See id.*

With respect to Commerce's factual findings, the Court will uphold the agency if its findings are supported by substantial evidence. "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, courts must sustain Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 137, 744 F.2d 1556, 1563 (1984).

III.

DISCUSSION

In the discussion below, the Court first examines whether Commerce's application of the "knew or should have known" standard is in accordance with the law. The Court then considers whether Commerce's finding that LG Semicon "knew or should have known" the DRAMs sold to the foreign business were destined for the United States is supported by substantial evidence. The Court finds in the affirmative on both questions.

A. *Commerce's Application of the "Knew or Should Have Known" Standard is Consistent with Legislative Intent and Prior Practice.*

LG Semicon asserts that Commerce incorrectly classified the DRAMs sold to the foreign business as "unreported U.S. sales" and thus incorrectly included such sales in LG Semicon's dumping margin. *See* Br. of Pls. LG Semicon Co., Ltd. and LG Semicon America, Inc. in Supp. of Pls.' Mot. for J. Upon the Agency R. ("Pls.' Br."), at 2. Specifically, LG Semicon challenges Commerce's finding that LG Semicon "knew or should have known" the ultimate destination of the DRAMs. *See id.* LG Semicon claims that the U.S. antidumping statute, legislative history, holdings of this court, and Commerce's own administrative decisions do not support Commerce's application of the "knew or should have known" standard. *Id.* The Court does not agree.

Under the U.S. antidumping statute, dumping margins are determined by comparing export price to normal value. *See* 19 U.S.C. §§ 1675(a)(2), 1677a(a), 1677f–1(c)(1994).

> The term "export price" means the price at which the subject merchandise is first *sold* (or agreed to be sold) before the date of exportation [to the U.S.] by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or *to an unaffiliated purchaser for exportation to the United States*.

19 U.S.C. § 1677a(a)(emphasis added). Thus, according to the plain language of the statute, Commerce must base export price not only on sales of the subject merchandise to unaffiliated purchasers in the United States, but also on sales to unaffiliated purchasers outside of the United States "for exportation to the United States." *Id.* Congress did not, however, instruct Commerce how to determine if merchandise has been sold "for exportation to the United States" in the text of the statute itself.

LG Semicon contends that Congress's intent on this matter is evident from legislative history and that Commerce's application of the "knew or should have known" standard is contrary to such intent. *See* Pls.' Br., at 16. Commerce and Micron argue that Commerce's standard comports with legislative intent. *See* Def.'s Mem. in Opp'n to Pls.' Mot. for J. Upon the Agency R. ("Def.'s Br."), at 18–19; Br. of Def.-Intervenor Micron Technology, Inc. in Opp'n to Pls.' Mot. for J. on the Agency R., ("Def.-Intervenor's Br."), at 10–11. The Court agrees.

Commerce's "knew or should have known standard" is plainly consistent with Congressional intent. The definition of "purchase price"[1] in the Statement of Administrative Action ("SAA") accompanying the Trade Agreements Act of 1979, "makes clear that if the producer *knew or had reason to know* the goods were for sale to an unrelated U.S. buyer * * * the producer's sales price will be used as 'purchase price' to be

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[1] The terminology originally used was "purchase price." Congress later changed the term to "export price." See 19 U.S.C. § 1677a(a). Congress made clear, however, that the two terms are coextensive. *See* The Uruguay Round Agreement Act, Statement of Administrative Action, H.R. Doc. 103–316, at 822–23 (1994) ("Notwithstanding the change in terminology, no change is intended in the circumstances under which export price (formerly 'purchase price') versus construed export price (formerly 'exporters sales price') are used.").

compared with that producer's foreign market value." H.R. Doc. No. 96–153, at 411 (1979)(emphasis added). And the SSA was expressly approved by Congress. *See* 19 U.S.C. § 2503(a) (1994) ("Congress approves the trade agreements * * * submitted to the Congress on June 19, 1979, and the statements of administrative action proposed to implement such trade agreements submitted to the Congress on that date.").

LG Semicon also argues that Commerce's "knew or should have known" standard is impermissible because it is contrary to Commerce's prior consistent practice. *See, e.g., M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Department of Commerce*, 2 Fed. Cir. (T) 36, 43–44, 729 F.2d 748, 755 (1984) (Commerce is obligated to follow a consistent practice unless it supplies adequate explanation). LG Semicon maintains that Commerce's consistent practice has been to apply an actual knowledge standard when evaluating whether third-party sales were "for" exportation to the United States. Pls.' Br., at 16–25. The Court disagrees with this contention.

In its briefs, LG Semicon identifies several determinations and cases that contain poorly crafted passages and language choices which tend to cloud the standard utilized by Commerce. *See, e.g., INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, 957 F. Supp. 251 (1997); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews*, 61 Fed. Reg. 65,527, 65,539 (Dec. 13, 1996). An examination of these determinations and cases, however, together with other Commerce determinations and judicial opinions, demonstrates that Commerce's application of the "knew or should have known" standard is consistent with the prior practice of the agency.[2]

First, Commerce has consistently applied the "knew or should have known" standard in prior determinations. For example, in *Certain Pasta from Italy: Termination of New Shipper Antidumping Administrative Review*, 62 Fed. Reg. 66,602 (Dec. 19, 1997), Commerce concluded that the sales of a pasta product in the United States should have been assigned to the pasta's Italian producer, not the unaffiliated U.S. trading company. *See id.* at 66,602–03. Commerce stated that "certain proprietary information on the record concerning the nature of the relationship between the parties involved in this review demonstrate that the producer *knew or had reason to know* that the pasta it sold * * * was destined for the United States." *Id.* (emphasis added); *accord Television Re-*

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[2] For example, LG Semicon cites *NSK Ltd. v. United States*, 21 CIT ___, 969 F. Supp. 34 (1997), for the proposition that Commerce utilizes a "knowledge" test which evaluates only actual knowledge. LG Semicon bases this contention, in part, on the legislative history cited by *NSK* which states that "if a producer *knew* that the merchandise was intended for sale to an unrelated purchaser in the United States * * *, the producer's sale prices to an unrelated middleman will be used as the purchase price." 969 F.Supp., at 60 (citing S.Rep. No. 96–249, at 94 (1979), *reprinted in* U.S.C.C.A.N. 381, 480 (emphasis added).

But the *NSK* court also cited, in the same string citation no less, H.R. No. 96–153, at 411, which states that, "[t]he definition makes clear that if the producer *knew or had reason to know* the goods were for sale to an unrelated U.S. buyer, * * * the producer's sales price will be used as 'purchase price'." (emphasis added).

Likewise, LG Semicon is misled by the *INA* decision. *See* 957 F. Supp. at 263. Unfortunately, *INA* is susceptible to misinterpretation due to its somewhat nebulous distinction between Section 1677a(b) and Section 1677b(a). *See id.* LG Semicon contends that *INA* makes a distinction based on the statutory provisions' different requirements for actual and imputed knowledge. *See* Pls.' Br., at 20–21. The distinction *INA* actually makes between the two statutory provisions, however, is one between general and specific knowledge. *See INA*, 957 F. Supp., at 263–65 & n.3.

ceivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review, 58 Fed. Reg. 11,211, 11,216 (Feb. 24, 1993); *Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 42,599, 42,599–61 (Oct. 22, 1990).

Moreover, Commerce's use of the "knew or should have known" standard was recognized and upheld by this court and the Federal Circuit in *Yue Pak, Ltd. v. United States*, 20 CIT 495 (1996), *aff'd*, No. 96–1398, 1997 WL 130319 (Fed. Cir. Mar. 21, 1997)(unpublished). In reviewing Commerce's practice this court found that

> Commerce interprets the phrase "for exportation to the United States" to mean that the reseller or manufacturer from whom the merchandise was purchased *knew or should have known* at the time of the sale that the merchandise was being exported to the United States.

Yue Pak, 20 CIT at 498 (emphasis added)[3]. Further, the court sustained Commerce's determination because the evidence was "adequate to support Commerce's conclusion that Plaintiff's suppliers *knew or should have known* of the U.S. destination of the merchandise." *See id.* at 503 (emphasis added).

In conclusion, Commerce's application of the "knew or should have known" standard is in conformance with legislative history, is a consistent practice of the agency, and has been previously sustained by this court. Thus, the Court finds Commerce's *Final Results* to be in accordance with the law.

B. *Commerce's Determination that LG Semicon Knew or Should Have Known That DRAMs it Sold to the Foreign Business Were Destined for Export to the United States is Supported by Substantial Evidence.*

LG Semicon next argues that Commerce's determination is not supported by substantial evidence under either the "actual knowledge" standard urged by LG Semicon or the "knew or should have known" standard used by Commerce. *See* Pls.' Br., at 25–43.

The administrative record as a whole, however, supports Commerce's finding that LG Semicon knew or should have known the DRAMs sold to the foreign business were destined for export to the United States. Commerce determined that LG Semicon knew or should have known its DRAMs were destined for export to the United States for a number of reasons. *See* Def.'s Br., at 24–37. The Court will address the most compelling reasons here. First, the volume of DRAMs LG Semicon sold to the foreign business was disproportionate to the foreign business' production capacity and the corresponding market capacity. Second, the

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[3] The Court acknowledges that the *Yue Pak* Court cites two cases that do not seem to explicitly support this proposition. *See Yue Pak*, 20 CIT 498 (citing *Sandvik AB v. U.S.*, 13 CIT 738, 721 F. Supp. 1322, *aff'd*, 904 F.2d 46 (Fed. Cir. 1990); *Peer Bearing Co. v. U.S.*, 16 CIT 799, 803–804, 800 F. Supp. 959, 964 (1992)); Pls.' Br., at 24. Nonetheless, the Court defers to the *Yue Pak* court's decision, and the Federal Circuit's affirmation thereof, and finds that the cases cited at least tangentially support the proposition. *See id.* This deference is especially appropriate in light of numerous other Commerce determinations that consistently apply the "knew or should have known" standard.

foreign business bears the indices of a maquiladora, a common mechanism for exportation of goods from Mexico to the United States. And finally, LG Semicon monitored the U.S. DRAMs market closely and would have been aware of sales of its product in the United States by an external source.

The strongest evidence on the record is the volume of sales LG Semicon made to the foreign business during the period of review ("POR") in comparison to the size of the foreign business' operations and the relevant non-U.S. market. *See* 63 Fed. Reg. at 50,876–77; Pls.' App., at CR 2023 (Mem. of 09/08/98 from John Conniff to Holly Kuga ("Unreported Sales Mem.")). This evidence supports Commerce's conclusion that given the number of DRAMs it sold to the foreign business, LG Semicon knew or should have known that the foreign business could not process those DRAMs; and that neither the Mexican nor Latin American market could absorb the DRAMs.

The sales statistics as evidence is persuasive. LG Semicon sold a large number of DRAMs to the foreign business during the POR. *See* App. to Def.-Intervenor Micron Technology, Inc.'s Br. in Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.-Intervenor's App."), at CR 1902 (Letter of 04/22/99 from Michael Kaplan, et al. to LaRussa, ("LaRussa Letter"), 15). Put in perspective, LG Semicon's sales of DRAMs to the foreign business during the POR were nearly three times LG Semicon's aggregate sales in the United States—the largest market for DRAMs in the world—during the same period. *See id.* Significantly, in a short span of time, the foreign business became the world's largest customer of LG Semicon's American operation. *See Id.* And, LG Semicon was allegedly only one of the many companies that supplied DRAMs to the foreign business. *See* Pls.' App., at CR 1860 (Mem. of 01/14/98 from Brian C. Smith and Rebecca Woodings to Louis Apple, 6.).

The sales statistics are particularly significant because of the size and limited production capabilities of the foreign business. By LG Semicon's own account, the foreign business utilized few production lines with few production workers. *See* Def.-Intervenor's App., at CR 1853 (Letter of 03/24/98 from Kaye, Scholer, Fierman, Hayes & Handler LLP to the Secretary of Commerce ("Kaye, Scholer Letter of 03/24/98"), App. 1, Decl. of Robert Simon, LG Sales Dir. for the Southwestern Area ("Simon Decl."), ¶ 4).

Moreover, the relevant foreign markets that might have been able to absorb the DRAMs LG Semicon sold to the foreign business were limited. *See* Unreported Sales Mem., 6. The Mexican market for integrated circuits, of which only a portion is attributed to DRAMs, is approximately $200 million a year. *See id.* The entire Latin American market for integrated circuits is $400 million. *See id.* Because LG Semicon's sales to the foreign business were substantial, those sales alone accounted for a large part of both the Mexican and Latin American markets for integrated circuits.

In short, LG Semicon sold a disporportionate number of DRAMs to a limited assembly facility within a limited market. This evidence reasonably supports Commerce's conclusion that LG Semicon knew or should have known that the DRAMs it sold to the foreign business most likely could not be processed by that entity or absorbed by the Mexican or Latin American markets, and instead were destined for export to the United States. This conclusion is especially sound when LG Semicon's self-proclaimed "intimate knowledge" of the foreign business and DRAM market is taken into account. *See* Simon Decl., ¶ 4; Kaye, Scholer Letter of 03/24/98, at App. 2, Decl. of Daniel Lee, Gen. Manager of Sales for LG Semicon America, Inc. ("Lee Declaration"), ¶ 3–7; Def.'s App. for Def.'s Mem. in Opp'n to Pls.' Mot. for J. upon the Agency R. ("Def.'s App."), at Ex. 2 (Mem. of 07/17/98 from Tom Futtner & John Conniff to Holly Kuga("Commerce Mem. of 07/17/98"), 3).

As additional support for its determination, Commerce asserts that the foreign business is a maquiladora. *See* Def.'s Br., at 29–30. A maquiladora is defined in the administrative record as "a Mexican corporation operating under a special customs regime which allows the corporation to temporarily import into Mexico duty-free, raw material, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for subsequent export." *See* LaRussa Letter, Attach. 3, NAFTA FAQs About Maquiladoras. In Commerce's view, the foreign business' status as a maquiladora should have alerted LG Semicon to the likelihood that its DRAMs would be exported to the United States. *See* Def's. Br., at 29–30. As evidence that the foreign business is a maquiladora, Commerce cites the facility's proximity to the U.S. border,[4] its assembly of electronics (an industry that dominates maquiladora trade),[5] and the numerous importation documents which identify the foreign business as a maquiladora.[6]

Notably, LG Semicon does not deny that the foreign business is a maquiladora, but instead claims that even if the facility is a maquiladora, this does not establish that the DRAMs sold to the foreign business were destined to be exported to the United States. *See* Pls.' Br., at 36–37. It is true that the foreign business' probable status as a maquiladora is not dispositive to this inquiry. It does, however, lend further support to Commerce's finding that LG Semicon knew or should have known the DRAMs it sold to the foreign business would be exported to the United States. Specifically, Commerce could reasonably infer from the foreign business' probable maquiladora status, together with the other evidence, that LG Semicon knew or should have known the foreign business could not use all the DRAMs it bought from LG Semicon to

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[4] The record contains information demonstrating that in 1996, 80% of goods exported by maquiladoras were exported to the United States. *See* LaRussa Letter, Attach. 5, Camila Castellanos, Maquiladora Industry Spurs Development, Novedas Editores, S.A. de C.V.

[5] *See* LaRussa Letter, Attach. 5, Maquiladoras-Recent Trends and Growth ("The largest concentration of maquiladoras is in electronics, textiles, and autoparts and accessories.").

[6] *See* Kaye, Scholer Letter of 03/24/98, Attach. 5, decl. of Chris Chun, Ex. A. Exhibit A contains seventy-six customs documents listing the exporter as LG Semicon and the importer as the foreign business. *See id.* Each document classifies the foreign business as operating as a maquiladora. *See id.*

manufacture a domestically marketable product. Commerce could also infer that LG Semicon knew or should have known that the surplus DRAMs would likely be exported to the United States through the foreign business' existing maquiladora mechanism.

Lastly, there is substantial evidence supporting Commerce's assertion that LG Semicon knew or should have known of the importation of the DRAMs it sold to the foreign business because LG Semicon would have been alerted to the presence of substantial numbers of new LG Semicon DRAMs in the U.S. market. *See* Def's. Br., at 36; Def.-Intervenor.'s Br., at 43–44. LG Semicon's direct sales to the U.S. market during the POR were minimal. *See* LaRussa Letter, 15. The administrative record demonstrates that a substantial number of LG Semicon's DRAMs were exported by the foreign business to the United States. *See* Unreported Sales Mem., 2. Importantly, the value of documented exports, alone, was approximately equal to the value of DRAMs sold by LG Semicon in the United States during the POR. *See* LaRussa Letter, 15. Moreover, there is no evidence that the LG Semicon DRAMs exported by the foreign business were entered into the United States as components of other products. Given these facts, as well as the sworn affidavits from Micron and LG Semicon employees attesting to substantial knowledge of the daily fluctuations of the U.S. DRAMs market,[7] it is unlikely that LG Semicon was not aware that a substantial number of new LG Semicon DRAMs were placed on the U.S. market. Together with other supporting evidence, this reasonably supports Commerce's conclusion that LG Semicon knew or should have known that its continuing sales to the foreign business were being exported to the United States.

In summary, the Court finds substantial evidence to sustain Commerce's *Final Results*. Together, the volume of DRAMs LG Semicon sold to the foreign business compared to the foreign business' production capacity and corresponding market capacity, the foreign business' probable status as a maquiladora, and LG Semicon's awareness of the U.S. DRAMs market, support Commerce's determination.

IV.

CONCLUSION

For all of the foregoing reasons, the Court sustains Commerce's *Final Results*. A separate order will be entered accordingly.

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[7] *See* Simon Decl.; LaRussa Letter, Ex. 4, aff. of Joseph D'Esopo, ¶ 2.

(Slip Op. 00–12)

CHRYSLER CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–10–00698

[Plaintiff's Motion For Summary Judgment and Defendant's Cross-Motion For Summary Judgment denied]

(Decided February 7, 2000)

Barnes, Richardson & Colburn (Lawrence M. Friedman and *Aaron M. Gothelf),* for Plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Aimee Lee); Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* At issue in this case is the 1991 importation by the Chrysler Corporation (now DaimlerChrysler Corporation, or "Chrysler") of certain "Clubcab" pickup trucks and the refusal of the U.S. Customs Service ("Customs") to grant Chrysler a partial duty exemption on those imports pursuant to item 9802.00.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although Chrysler did not initially seek such an exemption in entering the Clubcabs into the United States, Chrysler claims that its failure to do so was due to a clerical error that caused it to mistakenly believe that the trucks' engines were not of U.S. origin. Chrysler argues that, as it brought this clerical error and mistaken belief to Customs' attention in a timely manner, Customs must reliquidate its entries pursuant to 19 U.S.C. § 1520(c)(1) and grant it the partial duty exemption to which it is entitled. In relevant part, 19 U.S.C. § 1520(c)(1) provides that "the Customs Service may * * * reliquidate an entry or reconciliation to correct * * * a clerical error, mistake of fact, or other inadvertence."

Before the Court are the parties' respective motions for summary judgment. For the reasons stated below, the Court finds there to be genuine issues of material fact that preclude summary judgment for both parties.

II

BACKGROUND

In 1991, Chrysler imported from its subsidiary, Chrysler de Mexico, Clubcab pickup trucks containing a 5.9 liter, in-line six cylinder, turbo, diesel engine manufactured by the Cummins Engine Company ("Cummins") in the United States. Plaintiff's Statement Of Undisputed Material Facts ("Plaintiff's Statement") at ¶¶ 2–3; Defendant's Response To

Plaintiff's Statement Of Undisputed Material Facts at ¶¶ 2–3. Despite the U.S. origin of these Cummins engines, Chrysler did not file a claim for partial duty exemption, pursuant to HTSUS Subheading 9802.00.80,[1] when it entered the Clubcab trucks into the United States. Defendant's Statement Of Undisputed Material Facts ("Defendant's Statement") at ¶ 4. According to Chrysler, it did not do so because its import processing system mistakenly concluded that the engines were of Mexican origin. This mistake, Chrysler asserts, was caused when Chrysler de Mexico made arrangements with Cummins' Mexican subsidiary, Cummins S.A., to purchase the same, U.S.-manufactured engines that Chrysler was purchasing directly from Cummins in the United States and shipping to Chrysler de Mexico for assembly. Plaintiff's Memorandum In Support Of Its Motion For Summary Judgment ("Plaintiff's Memorandum") at 5. Because these purchases were pursuant to a Chrysler de Mexico purchase order, Chrysler claims, its automated process for making claims under Subheading 9802.00.80 did not recognize the U.S. origin of these engines. *Id.*

On October 1, 1991, Donald D. Rivait, a Chrysler employee responsible for customs compliance and reporting concerning components entered under Subheading 9802.00.80, was advised that the Cummins engines at issue had actually been manufactured in the United States and might qualify for duty-free treatment. Defendant's Statement at ¶ 12. Accordingly, by letter dated October 15, 1991, Mr. Rivait informed Customs that Chrysler was seeking a duty exemption for the subject engines. *Id.* at ¶ 13. On November 8, 1991, Chrysler's broker, Daniel B. Hastings, also advised Customs that certain Clubcab trucks, including those subject to this action, had U.S. origin engines. *Id.* at ¶ 15.

Despite these notices, from November 15 through November 29, 1991, Customs liquidated the relevant Clubcab trucks without granting Chrysler a duty exemption for the engines. *Id.* at ¶ 16. Chrysler did not challenge this action by filing a protest within the ninety days allowed under 19 U.S.C. § 1514 to challenge the classification of merchandise following liquidation.[2] *Id.* at ¶ 17. Rather, on June 18, 1992, Chrysler filed a claim seeking the reliquidation of the subject entries pursuant to 19 U.S.C. § 1520(c)(1), which allows Customs to correct "a clerical error, mistake of fact, or other inadvertence * * * not amounting to an error in the construction of a law." *Id.* at ¶ 18. Customs denied this claim on September 11, 1992, *id.*, and Chrysler filed a timely protest of this decision on December 9, 1999. *Id.* at ¶ 19. This protest was, in turn, denied by Customs on April 30, 1993, *id.*, and it is the denial of this protest that

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[1] HTSUS Subheading 9802.00.80 allows for a partial exemption from duties on

> [a]rticles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting * * *.

[2] In relevant part, 19 U.S.C. § 1514(c)(3) provides that "[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before * * * notice of liquidation or reliquidation * * *."

Chrysler has timely challenged. This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1581(a).

On June 11, 1999, Chrysler filed its Motion For Summary Judgment, arguing that the facts of this case establish, as a matter of law, that the actions of Chrysler and Chrysler de Mexico amount to clerical errors, mistakes of fact or other inadvertences which entitle it to a reliquidation of its Clubcab entries and a refund of duties improperly paid. On August 3, 1999, Defendant filed its Cross-Motion For Summary Judgment. For its part, Defendant argues that Chrysler's mistake constitutes an "error in the construction of a law" which cannot be remedied under 19 U.S.C. § 1520(c)(1), since both Chrysler and Customs had actual knowledge of the true origin of the engines before the expiration of the protest period following the liquidation of the Clubcabs. Alternatively, Defendant argues that, even if Chrysler's mistake is not "an error in the construction of a law," it is still entitled to summary judgment because Chrysler has failed to demonstrate any mistake of fact, clerical error or inadvertence through documentary evidence.

III

ANALYSIS

A

THE STANDARDS FOR SUMMARY JUDGMENT

Under USCIT R. 56(d), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of demonstrating the absence of all genuine issues of material fact. *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). This may be done by producing evidence showing the lack of any genuine issue of material fact or, where the non-moving party bears the burden of proof at trial, by demonstrating that the nonmovant has failed to make a sufficient showing to establish the existence of an element essential to its case. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

To successfully oppose a properly supported motion for summary judgment, the nonmovant may not simply rest on its pleadings. Rather, it must produce evidence "by affidavits or as otherwise provided in [USCIT R. 56]" which "set forth specific facts showing that there is a genuine issue for trial." USCIT R. 56(f); *see also Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987) ("[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.").

In determining whether the parties have met their respective burdens, the Court does not "weigh the evidence and determine the truth of the matter," but simply determines "whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In so do-

ing, the Court views all evidence in a light most favorable to the nonmovant, *drawing all reasonable inferences in the nonmovant's favor. United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Avia Group Int'l*, 853 F.2d at 1560.

B

CHRYSLER DID NOT MAKE AN "ERROR IN THE CONSTRUCTION OF A LAW."

As noted above, Defendant argues that summary judgment is appropriate because Chrysler committed an error in the construction of a law which, based on the plain language of 19 U.S.C. § 1520(c)(1), cannot be remedied under this provision. Because this claim, if true, would be dispositive of both parties' Motions, the Court's initial inquiry is whether the facts of this case support Defendant's argument. *See Ford Motor Co. v. United States*, 157 F.3d 849, 858 (Fed. Cir. 1998) ("If an error qualifies as an 'error in the construction of a law,' that inquiry is dispositive, but if it does not so qualify, the party seeking correction must still show that its error fits within one of the three correctable categories.").

1

CHRYSLER'S ERROR DOES NOT CONSTITUTE "AN ERROR IN THE CONSTRUCTION OF A LAW," AS TRADITIONALLY DEFINED.

19 U.S.C. § 1520(c) allows for reliquidation to correct "a clerical error, mistake of fact, or other inadvertence * * * not amounting to an error in the construction of a law." Although not specifically defined by statute or regulation, the distinction between a mistake of fact and an error in the construction of a law for purposes of § 1520(c) has evolved in case law:

> [M]istakes of fact occur in instances where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to. Mistakes of law, on the other hand, occur where the facts are known, but their legal consequences are not known or are believed to be different than they really are.

Executone Information Systems v. United States, 96 F.3d 1383, 1386 (Fed. Cir. 1996) (quoting *Hambro Automotive Corp. v. United States*, 66 C.C.P.A. 113, 119, 603 F.2d 850, 855 (1979)); *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd* 61 C.C.P.A. 90, 499 F.2d 1277 (1974) ("A mistake of fact exists where a person understands the facts to be other than they are, whereas a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts.") (citation and internal quotations omitted). In comparison, a "clerical error" has been defined as "a mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or copying the figures or in exercising his intention," *PPG Industries, Inc. v. United States*, 7 CIT 118, 123 (1984), while "inadvertence" has been described as an oversight or involuntary accident, or the result of inattention or carelessness. *Ford Motor Co.*, 157 F.3d at 860; *see also*

id. at 857 ("[F]or an error to be correctable, it must simultaneously qualify as at least one of the three enumerated types and not qualify as an 'error in the construction of a law.'").

Here, Chrysler has alleged what amounts to a clerical error, mistake of fact or other inadvertence—but not also an error in the construction of a law—at the time of entry. Through its pleadings and papers, Chrysler says that its import processing system mistakenly concluded that the Cummins engines at issue were of foreign origin, and that it was because of this mistake that Chrysler did not seek a duty exemption under Subheading 9802.00.80 when it entered the trucks into the United States. Such an allegation falls squarely within the definition of a mistake of fact; Chrysler believed the facts concerning the origin of the Cummins engines to be different than they really were. Similarly, Chrysler has alleged that Chrysler de Mexico made a clerical error or other inadvertence by itself issuing a purchase order for Cummins engines, in violation of Chrysler's purchasing policy. *See* Plaintiff's Memorandum at 10–11 ("Chrysler de Mexico, as a contract assembler of vehicles for DaimlerChrysler, understood and was required to follow [DaimlerChrysler's] policy on purchasing U.S. origin and other non-Mexican materials. No duty devolved upon Chrysler de Mexico to exercise any original thought, discretion or judgment in carrying out the policy with respect to U.S. origin components."). In contrast, the facts of this case do not appear to constitute an error in the construction of a law, since Chrysler, as demonstrated by its maintenance of an automated information management system for making claims under HTSUS item 9802.00.08, was well aware of the legal consequences of claiming, or not claiming, the benefits bestowed by this provision at the time of entry.[3]

2

CUSTOMS' ARGUMENT THAT A CORRECTABLE ERROR CAN BECOME "AN ERROR IN THE CONSTRUCTION OF A LAW" IS UNSUPPORTED BY THE LANGUAGE OF § 1520(c)(1).

Regardless of whether Chrysler *initially* made a correctable error, however, Defendant asserts that Chrysler's actions constitute "an error in the construction of a law" for purposes of § 1520(c)(1), since Chrysler discovered the true origin of the Cummins engines before the expiration of the protest period following liquidation. Defendant says that "Chrysler, in possession of the necessary information before liquidation of the entries and before the protest period had even begun, plainly had the obligation to follow the procedures of section 1514 and file a protest within 90 days of liquidation." Defendant's Reply Memorandum To Plaintiff's Response To Defendant's Cross-Motion For Summary Judgment ("Defendant's Reply") at 8.

While Defendant's position may well encourage importers, such as Chrysler, to correct factual errors at the earliest possible opportunity, it

[3] That Chrysler maintained such a system at the time of entry is not in dispute. *See* Plaintiff's Statement at ¶ 8, Defendant's Response To Plaintiff's Statement Of Undisputed Material Facts at ¶ 8.

has no support in the actual language of § 1520(c)(1). In relevant part, § 1520(c) provides as follows:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—
>
> (1) a clerical error, mistake of fact or other inadvertence * * * not amounting to a error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction * * *.

On its face, nothing in this language or in Customs' implementing regulations[4] supports Defendant's argument that a party loses its ability to challenge an error upon the expiration of the protest period, or that a mistake of fact, clerical error or other inadvertence somehow becomes an error in the construction of a law if not challenged within ninety days of liquidation.

Section 1520(c)(1) simply provides that a mistake of fact, clerical error or inadvertence in *any customs transaction* (*i.e.*, "in any entry, liquidation, or other customs transaction") may be remedied under this provision so long as the mistake is brought to Customs' attention *within one year* after the date of liquidation—a requirement that appears to have been satisfied in this case. Here, Chrysler allegedly made a mistake of fact in its initial entries of the Clubcabs (as well as a clerical error or other inadvertence in issuing two purchase orders), and it timely sought to correct these mistakes through invocation of § 1520(c)(1) within one year of liquidation. Thus, under the plain language of the statute, it appears that no other action was required of Chrysler to obtain the benefits of § 1520(c)(1), assuming that the alleged mistakes are otherwise adverse to Chrysler and manifest from the record or established by documentary evidence.

Had Congress intended to impose the restriction on § 1520(c)(1) that Defendant claims exists, it could have included language to this effect in the statute. That Congress failed to evidence such an intention in either the statute or the legislative history,[5] however, indicates no such restriction exists. *See Ishida v. United States*, 59 F.3d 1224, 1231 (Fed. Cir. 1995) (noting that, had Congress intended to limit the coverage of the Civil Liberties Act of 1988 in the manner asserted by the government, Congress could have expressed its intent in the statutory language).

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[4] 19 C.F.R. § 173.4(b), which essentially does no more than paraphrase 19 U.S.C. § 1520(c)(1), provides for the correction of a clerical error, mistake of fact, or other inadvertence, so long as the error "(1) Does not amount to an error in the construction of a law; (2) Is adverse to the importer; and (3) Is manifest from the record or established by documentary evidence."

Defendant has submitted no evidence that its position concerning what constitutes "an error in the construction of a law" is anything more than an argument advanced for the purposes of this litigation. As such, the Court need not consider whether Customs' interpretation of § 1520(c)(1) enjoys deference under the standards set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988) ("We have never applied the principle [of deference] * * * to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'").

[5] Defendant has not pointed out any legislative history that supports its interpretation.

This is especially true since, in the absence of any such explicit limitation, the plain language of § 1520(c)(1) appears to cover *all* mistakes of fact, regardless of when they are discovered. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) ("To ascertain whether Congress had an intention on the precise question at issue, we employ the traditional tools of statutory construction. The first and foremost tool to be used is the statute's text, giving it its plain meaning.") (internal quotes and citation omitted).

3

NEITHER *NEC* NOR *UNIVERSAL COOPERATIVES* SHOW THAT CHRYSLER COMMITTED "AN ERROR IN THE CONSTRUCTION OF A LAW."

Notwithstanding this lack of textual support, Defendant argues, *inter alia*, that this Court should be guided by the case of *NEC Electronics v. United States*, 13 CIT 214, 709 F. Supp. 1171 (1989). In *NEC*, this Court upheld Customs' dismissal of a § 1520(c)(1) claim after finding that the importer's representative had actual knowledge of the nature of the goods at issue, as well as the existence of its desired tariff classification, prior to the expiration of the liquidation/protest period. According to Defendant, the undisputed facts of this case show that Chrysler and its broker were similarly "certain of the nature of the merchandise and the resulting classification before * * * the expiration of the protest period," and that "nothing prevented Chrysler from protesting the liquidation" when Customs did not give it a duty exemption. Defendant's Memorandum[6] at 12–13. Thus, Defendant argues, since Chrysler could have initially protested the liquidations under 19 U.S.C. § 1514, this Court should follow *NEC* and find that Chrysler now "possesses no remedy under 19 U.S.C. § 1520(c)." *Id.* at 13.

At first sight, *NEC* supports Defendant's position. In a footnote, *NEC* makes clear that, even though the importer may have been unaware of certain factual attributes concerning its merchandise at importation, the fact that both the importer and Customs possessed the proper factual information "many months before liquidation" and "thus had ample time to properly contest the classification" prevented the importer from invoking § 1520(c)(1). *NEC*, 13 CIT at 218 n.4, 709 F. Supp. at 1174 n.4. Thus, without further inquiry, if *NEC* was binding authority it would appear to require dismissal of Chrysler's claims.

After *NEC*, however, the Court of Appeals For The Federal Circuit ("CAFC") considered a similar fact pattern in *Executone Information Systems v. United States*, 96 F.3d 1383 (1996). In *Executone*, an importer learned of its alleged mistakes of fact before the end of the initial protest period, and thus could have made timely challenges under 19 U.S.C.

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[6] Memorandum In Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Defendant's Cross-Motion For Summary Judgment ("Defendant's Memorandum").

§ 1514 within ninety days of liquidation.[7] Despite this fact, the CAFC rejected the government's assertion that the plaintiff was actually challenging the classification of merchandise, ruling instead that the plaintiff had properly alleged a correctable "mistake of fact" under § 1520(c)(1).

Most importantly for present purposes, in reaching this decision the CAFC did not address the issue of *when* the importer became aware of its alleged error. Rather, the CAFC simply inquired whether the plaintiff had alleged that a "mistake of fact" had ever occurred and, finding that Executone had alleged such an error at the time of importation, concluded that the facts of this case did not present an error in the construction of a law. *See Executone*, 96 F.3d at 1386 ("Here * * * Executone has alleged a mistake of fact: namely, Executone believed, *at the time of importation*, that valid Form A's had been filed when, in fact, they had not.") (emphasis added); *see also id.* at 1388 ("Here, based on the facts as alleged, the classification of Executone's merchandise * * * was clearly the result of a mistake of fact variety— Executone thought Form A's had been filed when, in fact, the forms had not been. This is precisely the type of error which is properly correctable through the application of 19 U.S.C. § 1520(c)(1).").

In light of this holding, as well as the above statutory analysis, it appears to this Court unwise to rely upon the analysis set forth in *NEC*. Although, in *Executone*, the CAFC did not explicitly discuss the issue of timing, its silence on the issue—in the face of an importer's clearly established knowledge of its factual mistake prior to liquidation—demonstrates that such knowledge does not render an error an "error in the construction of a law" for purposes of § 1520(c)(1). Rather, the CAFC's opinion indicates that, at least in a case like the one at bar, the time at which an importer becomes aware of its error is of no significance to the question of whether the alleged mistake constitutes an error in the construction of a law. Thus, to the extent that *NEC* states otherwise, the Court recognizes a conflict between this case and *Executone* and declines to follow this aspect of *NEC*.

Defendant also argues that Customs' decision to liquidate the merchandise as entered "may be likened to a decisional mistake of the type described in *Universal Cooperatives, Inc. v. United States*, 13 CIT 516, 715 F. Supp. 1113 (1989)]" since Chrysler, by way of letters from Donald D. Rivait and Daniel B. Hastings, made Customs aware prior to liquidation that the engines might qualify for a duty exemption. Defendant's Memorandum at 15. According to Defendant, although "Customs may have been mistaken as to the correct state of the facts," all relevant positions as to the facts were known by Customs prior to liquidation; thus

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[7] Executone, an importer of telephone handsets, failed to submit the necessary documentation to submit its claim for duty-free treatment. *Executone*, 96 F.3d at 1384. Soon after entry, therefore, and before liquidation, Customs notified Executone that the necessary documents were missing. *Id.* Despite notice, Executone did not submit the necessary documents or make a formal § 1514 protest in the ninety days following liquidation. *Id.* Rather, approximately six months after the entries were liquidated, Executone filed the proper forms with Customs and sought a reliquidation of its entries pursuant to § 1520(c)(1). *Id.*

creating an error in the construction of a law which cannot be challenged under § 1520(c)(1). *Id.*

In *Universal Cooperatives*, Customs, after conducting a laboratory analysis on an importer's entries of polypropylene baler twine, determined that the twine had actually been produced from polypropylene strips wider than what the importer had claimed; a state of facts which changed the classification of the merchandise. 13 CIT at 517, 715 F. Supp. at 1114. The importer did not timely seek to challenge this classification within ninety days of liquidation, but, five months after liquidation, sought to have the duties reliquidated under § 1520(c)(1) on the grounds that Customs' determination was a correctable mistake of fact. *Id.* Customs denied this request, and the importer sought review before this Court. *Id.*

In upholding Customs' decision, *Universal Cooperatives* distinguished between a "decisional mistake," in which a party makes the wrong choice between two known, alternative sets of facts, and an "ignorant mistake," in which a party is unaware of the existence of the correct, alternative set of facts. *Id.* at 518, 715 F. Supp. at 1114. Only ignorant mistakes, the Court held, are remediable under § 1520(c)(1), while decisional mistakes need to be challenged under § 1514 within ninety days of liquidation. *Id.* Applying this distinction to the facts before it, the Court stated:

> If there was a mistake here, it was surely of the decisional type. The government knew that plaintiff was seeking to enter the merchandise in a manner which required that the strips be wider than an inch. Nevertheless, the government, relying on a laboratory testing of a sample, rightly or wrongly, made a decision that the strips were less than one inch wide. This created a situation for which the conventional protest method of 19 U.S.C. § 1514 was manifestly designed, i.e., an importer with a fully informed position regarding its merchandise, confronting an informed, but adverse decision by the government. One of them may have been mistaken as to the correct state of the facts, but it was not from total ignorance of a possible alternative state of facts. * * * Here * * * all relevant positions as to the facts were known prior to the original liquidation and it would have been no hardship, and certainly no impossibility, for plaintiff to have made a timely protest against that liquidation. If the government was mistaken as to the facts as a result of having chosen incorrectly from a number of known alternatives, then the condition precedent for contesting that decision in court was the making of a timely protest under Section 514, thus allowing the question to be considered administratively in the most orderly and efficient way.

Id., 715 F. Supp. at 1114–15.

Contrary to Defendant's assertion, the facts of this case do not present a similar decisional mistake by Customs. In *Universal Cooperatives*, neither Customs nor the importer was ever faced with an ignorant mistake where they were simply unaware of the existence of a correct, alternative set of facts. Rather, from the start, both parties were fully

informed of both the potential alternative classifications and the respective facts supporting these alternatives—circumstances which the CAFC has described as presenting a "typical challenge to a Customs classification" where "the only proper course of action would have been to file a timely protest under section 1514." *Executone*, 96 F.3d at 1388.[8] In contrast, here both Chrysler and Customs appear to have been faced with an ignorant mistake at the time of importation, since neither party was aware of the fact that the Cummins engines were actually manufactured in the United States. That, of course, is precisely the type of "mistake" that this Court recognized as remediable under § 1520(c)(1) in *Universal Cooperatives*."[9]

4

THAT § 1520(c)(1) GIVES IMPORTERS THE ABILITY TO CORRECT MISTAKES OF FACT FOR UP TO ONE YEAR AFTER LIQUIDATION IS NOT AN "ABSURD AND ILLOGICAL RESULT."

Finally, Defendant argues that

> [i]f we accept Chrysler's interpretation that only the isolated slice of time at time of entry can be considered for a mistake of fact claim, every importer would always have [19 U.S.C. § 1520(c)], unbridled, at its disposal effectively creating a period of 1 year from liquidation in order [sic] contest liquidation. This interpretation leads to the absurd and illogical result of rendering section 1514 and the protest procedure useless in all instances, where mistakes of fact are alleged. Plainly, [19 U.S.C. § 1520(c)] is not meant to nullify the effect of section 1514 and Chrysler's contentions must be rejected.

Defendant's Reply at 4.

Through § 1520(c)(1), Congress has given Customs the ability to correct factual mistakes even after the legality of all other orders would

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[8] In *Executone*, the CAFC stated that such a "typical challenge" exists "where Customs evaluated the merchandise and, based on its construction of the tariff schedule, determined into which of two categories the merchandise must be placed * * *. In such a case, there is no dispute that the only proper course of action would have been to file a timely protest under section 1514." 96 F.3d at 1388. In contrast, in *Executone* the CAFC observed that the facts before it presented a typical mistake of fact, since, *inter. alia*, "Customs has never disputed that Executone's merchandise would properly qualify for duty-free treatment * * * had Form A's been properly submitted." *Id.*

This distinction between a "decisional mistake" (*i.e.*, a "typical challenge") and an "ignorant mistake," of course, is a reflection of the fact that although "Congress clearly envisioned a liberal mechanism for the correction of inadvertences under section 1520(c)(1)," *ITT Corp. v. United States*, 24 F.3d 1384, 1389–90 (Fed. Cir. 1994), § 1520(c)(1) is nevertheless a narrow exception to the rule that a Customs classification decision is final unless a protest is filed within ninety days following liquidation. *See infra*, Section III.B.4 (discussing how it is not "absurd" or "illogical" that Congress created an exception to the finality requirements of 19 U.S.C. § 1514 for a limited range of errors).

[9] Defendant further suggests that any "ignorant mistake" that occurred at entry became a "decisional mistake" once Chrysler had informed Customs, through the letters from Donald D. Rivait and Daniel B. Hastings, that the Club-cabs may be eligible for a duty exemption. This suggestion is akin to Defendant's argument that an initial mistake of fact may be transformed into an error in the construction of a law. As discussed above, such a position runs contrary to both the plain language of § 1520(c)(1) and the CAFC's decision in *Executone*, and the Court rejects it as such.

Indeed, even if an "ignorant mistake" could become a "decisional mistake," the undisputed facts of this case show that Customs was not in possession of all the relevant factual information upon which it could have made an informed classification decision. While it is true that Chrysler personnel had informed Customs prior to liquidation that the Cummins engines were actually of U.S. origin, there is no dispute that Chrysler failed to submit adequate proof of this fact prior to liquidation. As Defendant itself notes, "both letters advising Customs of 9802 eligibility were vague, unspecific and failed to provide adequate proof that the engines were in fact U.S. manufactured goods." Defendant's Reply at 10. Accordingly, and in contrast to *Universal Cooperatives*, in this case Customs was not supplied with the complete factual information that would have allowed it to have made a wrong choice between two *known*, alternative sets of facts (*i.e.*, a decisional mistake). *See Taban Co. v. United States*, 960 F. Supp. 326, 334 (CIT 1997) ("While * * * it is well-established that a determination by the Customs Service that merchandise is covered by a certain provision of the TSUS is a conclusion of law, Customs must make its classification determinations based on accurate and complete information.") (internal quotes and citation omitted).

have become final and conclusive under 19 U.S.C. § 1514, "notwithstanding a valid protest was not filed." In so doing, "Congress clearly envisioned a liberal mechanism for the correction of inadvertences," *Aviall of Texas, Inc. v. United States*, 70 F.3d 1248, 1250 (Fed. Cir. 1995), since "*[t]he Government has no interest in retaining duties which were improperly collected as a result of clerical error, mistake of fact or inadvertence*," *C.J. Tower*, 68 Cust. Ct. at 21, 336 F. Supp. at 1399 (quoting Hearings on H.R. 5505 before the Senate Committee on Finance, 82nd Cong., 2d Sess., 30 (1952)) (emphasis added). *See also ITT Corp.*, 24 F.3d at 1389 (similarly noting that "Congress clearly envisioned a liberal mechanism for the correction of the specific inadvertences set forth in § 1520(c)(1)," and citing various pieces of legislative history which "emphasize[ ] the remedial purpose of the statute"). Stated another way, even though § 1520(c)(1) is a "narrow exception" to the rule that a Customs classification decision is final unless a protest is filed within ninety days following liquidation, *Degussa Canada Ltd. v. United States*, 87 F.3d 1301, 1302 (Fed. Cir. 1996), it is an exception that has broad application when applicable.

In light of this remedial purpose, the fact that § 1520(c)(1) allows importers up to one year following liquidation to correct a *demonstrated* mistake of fact, clerical error or other inadvertence—even when the error is discovered prior to liquidation—is not an "absurd and illogical result." While a prudent importer would presumably want to correct its inadvertence at the earliest possible opportunity, there is no requirement in § 1520(c)(1) that an importer *must* do so. *Cf. ITT Corp.*, 24 F.3d at 1388 (noting that, while a prudent importer would submit the necessary information to allow a prompt and favorable § 1520(c)(1) decision by Customs, "neither statute nor case law precludes court-ordered reliquidation under § 1520(c)(1) after a trial de novo"). To find otherwise would, in essence, read an arbitrary cut-off date into the language of § 1520(c)(1) and obligate this Court to answer such questions as (1) when did the importer become aware of its alleged mistake of fact;[10] (2) when was the importer able to substantiate its alleged error; and (3) could the importer have made a timely, meaningful protest within ninety days of liquidation.[11] That, it appears to the Court, is contrary to both the letter and spirit of § 1520(c)(1).

In short, Defendant has not shown that Chrysler made an "error in the construction of a law" that would preclude it from relief under 19 U.S.C. § 1520(c)(1). Rather, Chrysler has alleged that it failed to seek a duty exemption at entry because, due to a clerical error, it was unaware of true origin of the Cummins engines. These are precisely the types of

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[10] Chrysler correctly and persuasively observes that, "[u]nder the Government's approach any subsequent attempt by an importer to establish the correct facts and that a mistake of fact had occurred would negate the original mistake of fact and preclude relief. This is true because almost any attempt to explain the mistake will require finding someone in the company who knew the true facts at or before the time of entry." Plaintiff's Memorandum In Reply To Defendant's Response To Plaintiff's Motion For Summary Judgment And Response To Defendant's Cross-Motion For Summary Judgment ("Plaintiff's Reply") at 20.

[11] Such inquires, however, may be appropriate in determining whether an importer has actually demonstrated an "other inadvertence." *See infra*, note 17.

errors that are correctable through 19 U.S.C. § 1520(c)(1). Accordingly, it is to the question of whether Chrysler has sufficiently gone beyond making mere allegations, and adequately supported its claims through record or other documentary evidence, that the Court now turns.

C

GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO WHETHER CHRYSLER DE MEXICO COMMITTED A "CLERICAL ERROR" OR "OTHER INADVERTENCE."

The first correctable error alleged by Chrysler is that its subsidiary, Chrysler de Mexico, committed a clerical error or other inadvertence by not following Chrysler's purchasing policy and itself issuing a purchase order for Cummins engines. *See* Plaintiff's Memorandum at 10–11. As noted previously, a "clerical error" has been defined as "a mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or copying the figures or in exercising his intention." *PPG Industries*, 7 CIT at 123. Consistent with this definition, the CAFC has made clear that in order to demonstrate a "clerical error," a plaintiff must show that the party having committed the alleged error "was 'one upon whom no duty devolved to exercise original thought or judgment'" *Ford Motor Co.*, 157 F.3d at 860 (quoting *Yamada v. United States*, 26 C.C.P.A. 89, 94 (1938)). In so doing, the plaintiff must prove that the party in error was given "complete, binding, non-discretionary instructions." *Id.* at 861. Once a plaintiff has made such a showing, Customs may nevertheless "show that the error is not correctable by showing that a noncorrectable error of those who did have discretion in the matter contributed to the mistake." *Id.* at 860.

Chrysler has failed to show that it is entitled to summary judgment. Although Plaintiff alleges that Chrysler de Mexico violated DaimlerChrysler's purchasing policy by acquiring U.S.-produced Cummins engines with its own purchase order, the only relevant evidence it has submitted is the deposition testimony of Gordon Heidacker, a former senior buyer of engines and accessory drives at Chrysler, that purchase orders were issued for the Cummins engines by both Chrysler U.S. and Chrysler de Mexico. *See* Plaintiff's Memorandum at 10 (citing Heidacker Dep. at 38). Chrysler has provided no evidence to support its claims that the "procedure for all non-Mexican origin components was that such components be purchased by [DaimlerChrysler] and resold to Chrysler de Mexico," and that "[n]o duty devolved upon Chrysler de Mexico to exercise any original thought, discretion or judgment in carrying out the policy with respect to U.S. origin components." *Id.* at 10–11. Since Chrysler bears the burden of demonstrating these elements in order to show that Chrysler de Mexico committed a correctable clerical error, *Ford Motor Co.*, 157 F.3d at 860–61, its failure to identify any evidence on these counts precludes summary judgment in its favor.

Similarly, Chrysler has not brought forth any evidence that Chrysler de Mexico's actions constitute an "inadvertence." As noted previously, "inadvertence" has been described as an oversight or involuntary accident, or the result of inattention or carelessness. *Id.* at 860. Chrysler has

introduced no evidence that Chrysler de Mexico's issuance of purchase orders was the result of an oversight, accident or carelessness, as opposed to a willing and informed choice. *See id.* at 860–61 (finding that where the party in error "garbled his instructions and therefore consistently— not carelessly— did not carry them out," the error may qualify as a "clerical error" but not as an "inadvertence"). In fact, Plaintiff's own evidence seems to raise a question as to whether Chrysler de Mexico purchased the Cummins engines itself in order to receive a commercial advantage; a situation which casts doubt on any claim that its actions were involuntary or a mistake. *See* Deposition of Gordon Heidacker at 16–17 ("Q. In other words, Chrysler de Mexico would not take direction from Cummins U.S. or did not want to take direction? A. They were seeking an advantage I think currency-wise.").

Despite this failure by Chrysler, however, the Government has not demonstrated that it is entitled on these claims to judgment as a matter of law. In its Cross-Motion For Summary Judgment, Defendant mostly ignores Chrysler's claim concerning clerical error or inadvertence and, consequently, does not adequately discuss Chrysler's failure to produce evidence of its purchasing policy or Chrysler de Mexico's subordinate (*i.e.*, non-discretionary, clerical) status as a sufficient basis upon which the Government is entitled to summary judgment. Defendant chose to concentrate on evidence relating to Chrysler's "mistake of fact" claim, and, to the degree that it has challenged Chrysler's "clerical error" and "other inadvertence" claims, it has only done so by observing that "[d]espite having ample time opportunity to do so, * * * Chrysler has never produced any purchase orders issued by Chrysler de Mexico to Cummins S.A., nor any other documents evidencing the alleged transaction between Chrysler de Mexico and Cummins, S.A. which would substantiate the alleged error." Defendant's Memorandum at 17.[12] Upon close review, however, this argument does not hold true, since the Heidacker deposition clearly shows that two purchase orders were issued for the Cummins engines.[13]

In short, both the Government and Chrysler have failed to demonstrate that they are entitled to summary judgment on this point.

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[12] As discussed below, in Defendant's Supplemental Memorandum addressing the proof that Chrysler must show to demonstrate that it committed a mistake of fact, the Government notes that "Chrysler did not provide any documentary evidence to substantiate its purchasing policy." Defendant's Supplemental Memorandum at 6. This is the first time that the Government addresses this lack of evidence, as neither its Memorandum In Support Of Its Motion For Summary Judgment nor its reply memorandum specifically note this shortcoming as a grounds for summary judgment concerning Chrysler's clerical error or other inadvertence claim. As such, the Court does not consider Defendant to have made a proper motion for summary judgment on this issue.

[13] *See* Heidacker Deposition at 38, lines 20–23 ("Q. Are you saying that two purchase orders were issued, one by Chrysler U.S. for this engine and another purchase order by Chrysler de Mexico to Cummins SA? A. Yes, and I can tell you why."). While the Heidacker deposition may not be as persuasive evidence as an actual purchase order, this deposition most certainly constitutes at least some evidence to support Chrysler's claim that Chrysler de Mexico issued a purchase order to Cummins S.A.

D

GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO WHETHER CHRYSLER MADE A "MISTAKE OF FACT."

Chrysler's second claim is that it made a correctable "mistake of fact" when it mistakenly believed the engines in the Clubcab trucks it was importing to be of Mexican origin. Plaintiff's Memorandum at 11–12. For Customs to reliquidate an entry to correct such a mistake, § 1520(c)(1) and 19 C.F.R. § 173.4(3) require a party to either (1) show that the alleged error is manifest from the record, or (2) establish the alleged error by documentary evidence. On this point, both parties claim that they are entitled to summary judgment.

To decide these respective motions, it is first necessary to determine what evidence Chrysler must produce to establish its alleged mistake of fact "by documentary evidence,"[14] and what evidence (if any) Defendant may introduce to refute this showing. On these points, which will be discussed in turn below, the parties differ. Chrysler argues that, in order to establish a "mistake of fact," a party need not demonstrate the underlying cause of its mistake, but must only show that it did not know the facts as they truly were at the time of entry. Plaintiff's Supplemental Brief at 2. Chrysler also argues that any negligence by an importer in making an initial factual determination would not preclude its determination from being a "mistake of fact" under 19 U.S.C. § 1520(c)(1), and notes in support that in several cases from this Court "the initial negligence [by importers] did not preclude the errors from being mistakes of fact for purposes of 19 U.S.C. § 1520(c)(1)." *Id.* at 4–6.

Defendant takes the opposite positions. According to Defendant, in order to prove that it committed a correctable "mistake of fact," an importer must go beyond showing that it was mistaken concerning the correct state of fact, and must establish the underlying *cause* or *reason* for its mistake. Here, the Government asserts that Chrysler has not brought forth any evidence that it can meet this burden, since Chrysler has "not provide[d] any documentary evidence to substantiate its purchasing policy, nor has it produced copies of the purchase orders allegedly issued by Chrysler de Mexico to Cummins S.A." Defendant's Supplemental Memorandum at 6. Rather, it argues that "[a]n examination of Chrysler's mistake in initially determining the country of origin of the engines indicates that negligence exists," and that such negligence, which was the cause of Chrysler's "mistake," precludes a finding that a "mistake of fact" exists for purposes of § 1520(c)(1). *Id.* at 7. Moreover, the Government adds that Chrysler was also negligent in failing to act after it discovered its mistake, since it could have submitted the required documentation during the protest period following liquidation (but did not). *Id.* at 4.

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[14] In this case, Chrysler's alleged mistake of fact is not manifest from the record (*i.e.*, "apparent * * * from a facial examination of the entry and the entry papers alone," *ITT Corp.*, 24 F.3d at 1387), and Chrysler does not appear to claim otherwise. Thus, the Court need only inquire whether Chrysler has established its claimed mistake of fact through documentary evidence.

1

ALTHOUGH CHRYSLER NEED NOT PRODUCE EVIDENCE OF THE UNDERLYING CAUSE OR REASON FOR ITS MISTAKE OF FACT IN ORDER TO ESTABLISH ITS ERROR BY DOCUMENTARY EVIDENCE, THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER CHRYSLER KNEW THE TRUE ORIGIN OF THE CUMMINS ENGINES AT THE TIME OF ENTRY.

The first issue the Court needs to address is the nature of the evidence that Chrysler must produce to demonstrate its alleged error. As noted previously, a "mistake of fact" for purposes of § 1520(c)(1) has repeatedly been defined as occurring when "(1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to." *Executone*, 96 F.3d at 1386 (quoting *Hambro*, 66 C.C.P.A. at 119, 603 F.2d at 855). On its face, this definition does not require a plaintiff to demonstrate evidence of the underlying *cause* or *reason* for its mistake of fact, and case law does not appear to support of such a requirement. Specifically, a review of several cases interpreting § 1520(c)(1) shows that, although the underlying cause of a "mistake of fact" may have been known and recognized, *see, e.g. Aviall of Texas, Inc. v. United States*, 18 CIT 727, 734, 861 F. Supp. 100, 107 (1994), *aff'd* 70 F.3d 1248 (Fed. Cir. 1995) (finding that "the admissions of Aviall's broker disclose that the failure to file a new yearly blanket certification was due to the fact that the broker 'forgot' to renew the blanket certification"), in no case has it been held that an importer needed to demonstrate the underlying cause of the factual misunderstanding. Rather, courts have required a plaintiff to demonstrate, from the entry documents or other evidence, only two points in order to substantiate its "mistake of fact": (a) the correct state of facts; and (b) that either the importer or Customs had a mistaken belief as to the correct state of facts.

For example, in *United States v. C.J. Tower & Sons of Buffalo, Inc.*, 61 C.C.P.A. 90, 499 F.2d 1277 (1974), the Court of Customs and Patent Appeals ("CCPA"), in reviewing whether an importer had provided sufficient proof of its alleged mistake of fact, noted that the importer's statement of material facts included the following two facts to which the Government had admitted:

> 15. The merchandise covered by the protest herein consists of materials certified to the Commissioner of Customs by the authorized procuring agencies to be emergency war material purchased abroad.
>
> 17. At no time prior to sixty days after liquidation of the merchandise covered by the protest herein did the District Director of Customs at Buffalo, New York know the fact set out in number 15 above, nor did plaintiff.

C.J. Tower, 61 C.C.P.A. at 96, 499 F.2d at 1282. Based on these two admitted facts, the CCPA held simply that "we are unable to see anything that needs to be proved to justify the summary judgment granted to [the importer]," and did not further require the importer to provide proof of the underlying cause of its mistake. *Id.* at 97, 499 F.2d at 1282. Similar recognition of the proof necessary to show a "mistake of fact" is illus-

trated in a number of other cases. *See, e.g., C.J. Tower*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399 ("In the statement of material facts, the parties concede that both the district director and the importer were unaware of the facts justifying duty-free entry until after the liquidations became final. Such lack of knowledge, both in kind and degree, is such as to clearly come within the statutory language, 'mistake of fact, or other inadvertence.'"); *PPG Industries, Inc. v. United States*, 4 CIT 143, 148 (1982) (finding that plaintiff had failed to produce evidence as to "the true experimental character and intended use of the subject merchandise."); *Concrete Pumps, Ltd. v. United States*, 10 CIT 505, 509, 643 F. Supp. 623, 625 (1986) (granting the government's motion to dismiss where "the protests filed by plaintiff and the allegations in its complaint are void of any reference to a mistake in the nature of the goods."); *Degussa*, 87 F.3d at 1304 (upholding dismissal where "there was no factual misapprehension about the nature of the imported merchandise. The only misapprehension was about the proper classification * * *.").

In light of this and other authority, the Court holds that Chrysler may establish its "mistake of fact" by showing (a) that the Cummins engines at issue are actually of U.S. origin; and (b) that it was mistaken as to the origin of the Cummins engines when it entered the Clubcab trucks into the United States. Although Defendant argues that Chrysler has not met its evidentiary burden, since it has neither provided any documentary evidence to substantiate its alleged purchasing policy nor produced copies of the purchase orders allegedly issued by Chrysler de Mexico to Cummins S.A, such evidence goes to the underlying *cause* of Chrysler's mistake of fact—an issue which Chrysler need not show. Accordingly, the Court need not consider the alleged lack of such evidence in deciding whether Chrysler has demonstrated a "mistake of fact."[15]

Applying, then, these standards to the facts at hand, the Court does not find either party to be entitled to judgment as a matter of law at this time. Although there is no dispute that the engines at issue are of U.S. origin, *see* Defendant's Statement of 12/15/99 (acknowledging that Chrysler has "recently (during the pendency of this litigation) provided the U.S. Customs Service with adequate documentary proof to demonstrate that the subject diesel engines were manufactured by Cummins U.S. in the United States"), there is a genuine issue as to Chrysler's knowledge at the time of importation.

In response to the Court's Order of January 14, 2000, asking Chrysler to identify exactly what evidence it has submitted to demonstrate that it was mistaken as to the true origin of the Cummins engines when it entered the Clubcabs into the United States, Chrysler identified four pieces of evidence: (1) Chrysler's very failure to claim the 9802 exemption on the engines; (2) deposition testimony of Gordon Heidecker concerning the confusion surrounding the purchase of the Cummins

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[15] Even if the Court were to consider such evidence, the Heidacker deposition, discussed above, would preclude awarding Defendant summary judgment, since it constitutes evidence as to the underlying cause of Chrysler's alleged mistake of fact (*i.e.*, the fact that two purchase orders were issued for the Cummins engines).

engines due to the launch of a new vehicle and Chrysler de Mexico's purchasing requirements; (3) deposition testimony of Don Rivait concerning the process Chrysler employs to compute and audit the 9802 value of its Mexican-made vehicles (and how the "failure of the process to capture the value of engines indicates that [Daimler Chrysler] made a mistake of fact as to the origin of the engines."); and (4) the October 15, 1991, letter Chrysler sent to Customs identifying its mistake in failing to make a 9802 claim for the value of the engines. In opposition, Defendant cites various evidence which it claims indicates that "the vehicle identification number ('VIN') and sales code 'ETB,' both of which were in the possession of Chrysler at the time of entry, provided information that the engines were manufactured by Cummins in the United States, and were the only engines for use in the Clubcab truck." Defendant's Statement of 01/21/00. "Consequently," the Government claims, "the VIN and 'ETB' code should have indicated to Chrysler that the engines were of United States origin at the time of entry." *Id.*

Upon reviewing this evidence, the Court is not convinced that the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. at 252. While none of Chrysler's evidence goes directly to the issue of whether it (collectively) or any of its employees (individually) was mistaken as to the U.S. origin of the Cummins engines at entry, a reasonable fact-finder could draw inferences from this evidence and the undisputed facts of this case (namely, the existence of Chrysler's 9802 system) to arrive at such a conclusion. Similarly, a reasonable fact-finder could, based on the evidence identified by Defendant, come to the opposite conclusion. Defendant's evidence suggests that there were means besides the 9804 report by which Chrysler's employees could have become aware of the U.S. origin of engines. As such, a trier of fact could rationally conclude that Chrysler employees were either actually or constructively aware of the origin of the Cummins engines at entry, but simply failed to take action until months later.[16] This is especially true in light of Chrysler's failure to date to submit any direct evidence concerning the actual knowledge of its employees.

In short, the Court finds there to be a genuine issue of material fact as to Chrysler's "knowledge" at the time of entry. This state of facts precludes summary judgment for Chrysler and, absent other grounds for granting Defendant's Motion, similarly precludes summary judgment in its favor. Accordingly, it is to the final arguments advanced by Defendant that the Court now turns.

2

ANY NEGLIGENCE BY CHRYSLER IN ARRIVING AT ITS INITIAL FACTUAL BELIEF IS IRRELEVANT TO WHETHER IT COMMITTED A "MISTAKE OF FACT."

As an additional basis for seeking summary judgment, Defendant claims that Chrysler acted negligently in initially determining the coun-

[16] Some of Chrysler's own evidence could also support such a conclusion. *See* Deposition of Don D. Rivait at 39 ("Q. Okay. Now, could you tell me exactly your recollection of why Chrysler didn't claim 9802 for the engines in issue in this case? A. No, I can't recall why.").

try of origin of the engines, and that such negligence precludes a finding that a "mistake of fact" occurred for purposes of § 1520(c)(1). According to Defendant, at the time of entry Chrysler's employee in charge of its 9802 system, Donald D. Rivait, negligently failed to consider relevant information (namely, sales codes on invoices and vehicle information numbers) which indicated the true origin of the Cummins engines. Defendant's Supplemental Memorandum at 7–8. In fact, Defendant argues, "Chrysler's entire 9802 program was negligently set up," since "[f]ailure to include the sales code and VIN into the 9802 program, both of which are not affected by erroneous purchase orders, amounts to a lack of reasonable care * * *." *Id.* at 8.

At its heart, Defendant's argument is based on an assumption that negligence by an importer in initially determining a factual characteristic of a product may prevent an error from being a "mistake of fact" under 19 U.S.C. §1520(c)(1). This assumption, however, is without any apparent support in either the text of the statute or the relevant case law, and Defendant has failed to provide the Court with any such authority for its position.

As noted previously, § 1520(c)(1) provides a liberal mechanism for the correction of mistakes, since Customs has no interest in retaining duties that were erroneously paid on account of a factual mistake, clerical error, and other inadvertence not amounting to an error in the construction of a law. Adopting the position asserted by Defendant, however, would defeat this purpose, since negligence may play a role in many, if not most, errant factual determinations by importers. Thus, to recognize negligence as precluding a factual error from being a "mistake of fact" under § 1520(c)(1) would severely curtail the remedial reach of § 1520(c)(1)—a result which this Court, absent authority to the contrary, declines to adopt.

In this regard, the Court takes particular note of Chrysler's argument that although "[s]everal cases in which importers established a mistake of fact involve actions that might be looked upon as initial negligence on the part of the importer in determining a factual characteristic[,] * * * [i]n these cases, the initial negligence did not preclude the errors from being mistakes of fact for purposes of 19 U.S.C. § 1520(c)(1). Plaintiff's Supplemental Memorandum at 4–5 (citing *C.J. Tower*, *supra*, and *Zaki Corp v. United States*, 960 F. Supp. 350 (CIT 1997)). That both this Court and the CAFC have, in *C.J. Tower*, *Zaki* and many other such instances, not even discussed whether negligence was the cause of the alleged factual errors, only further indicates that the question of initial negligence by an importer is simply irrelevant to whether a "mistake of fact" has been shown for purposes of § 1520(c)(1).

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"NEGLIGENT INACTION" BY CHRYSLER AFTER DISCOVERING ITS FACTUAL ERROR WOULD NOT PRECLUDE IT FROM RELIEF UNDER § 1520(c)(1).

The last point raised by Defendant is that Chrysler was negligent in failing to bring a timely challenge under § 1514 after discovering the true origin of the Cummins engines. According to Defendant:

> [A]lthough Chrysler had actual knowledge of the origin of the engines, it did not provide Customs with the information necessary to establish the 9802 eligibility of these engines. Moreover, even after liquidation, Chrysler still had the opportunity to submit the required documentation during the protest period for the entries at issue here. Chrysler's simple failure to do so, while having actual knowledge of the origin of the engines and knowledge that the Manufacturer's Affidavit was a documentary requirement, plainly distinguishes the present case from *C.J. Tower*, and amounts to negligent inaction, precluding the application of [19 U.S.C. § 1520(c)].

Defendant's Supplemental Memorandum at 4–5.

While Defendant's argument is substantively different from its claim, discussed above, that Chrysler committed an "error in the construction of a law," the analysis is similar. In essence, Defendant's argument requires an importer who discovers (and can substantiate) its mistake of fact before the end of the ninety-day protest period following liquidation to protest its mistake during this period, or be punished for its delay. Such a requirement is not in the actual language of § 1520(c) and, it appears to the Court, is inconsistent with the explicit exception of § 1520 from the finality requirements of § 1514. Here, it is undisputed that Chrysler brought its error to Customs' attention within one year of liquidation; as such, Chrysler's actions were timely, and the Court need not inquire into the question of *when*, within this one-year period, Chrysler decided to make its § 1520(c) claim. To find otherwise would graft onto § 1520(c)(1) a requirement which does not appear in either the statute or its implementing regulations—a result which the CAFC has stated would be clearly improper. *See Aviall*, 70 F.3d at 1250 (stating that, besides the requirements set out in the statute, "section 1520 provides no further limitation on errors, mistakes, or other inadvertence.").

In holding that it need not inquire into the issue of "negligent inaction" by Chrysler, the Court notes that the situation at bar is distinguishable from that considered in *Executone*. In *Executone*, the CAFC, in finding that the importer had failed to show that it had actually committed a "mistake of fact," stated that

> Executone makes no attempt to explain why it failed to file Form A's until after the time for filing a protest had lapsed. Executone's "proof" of inadvertence falls woefully short and, if anything, establishes only that Executone acted negligently. Executone repeatedly asked Radix to file the Form A's. Radix, however, failed to do so. From the evidence currently in the record, it appears that Radix employees negligently failed to carry out Executone's instructions and Executone negligently failed to ensure that its agent timely

> filed the Form A's. Executone, by repeating its request, obviously knew the forms had not yet been filed, yet failed to act.

Executone, 96 F. 3d at 1390.

In its Supplemental Brief, Defendant argues that this analysis supports its argument that Chrysler should have filed a § 1514 protest following liquidation, and cannot now seek the benefits of § 1520(c). Although, in *Executone*, the CAFC recognized that the importer had acted negligently in failing to file its necessary forms until *after* the time for filing a protest had lapsed, it did so only as part of its overall finding that the plaintiff had not provided *any evidence* to show its alleged "mistake of fact" (*i.e.*, to substantiate its claim that it erroneously believed that Form A's had been filed). As such, and as Chrysler accurately observes, "*Executone* stands only for the unremarkable proposition that an importer seeking reliquidation under § 1520 must present facts sufficient to establish that a mistake of fact, clerical error or other inadvertence has occurred. Executone failed to meet that burden and left the [CAFC] with nothing but evidence of Executone's inattention to an entry." Plaintiff's Supplemental Brief at 6.

In contrast, here Chrysler has submitted some evidence to show that it committed a mistake of fact in its initial entry. Should Chrysler carry its burden on this issue, and demonstrate at trial that it actually did make such a mistake, Chrysler will have established its right to have one year from the date of liquidation to seek the correction by Customs of its mistake of fact, as opposed to the ninety-day protest period following liquidation provided under § 1514.[17] Executone, because it never demonstrated that it actually committed a mistake of fact, was never entitled to this right in its case.

In short, the Court finds that neither of Defendant's "negligence" arguments, and the evidence identified therewith, are relevant to the issue of whether Chrysler committed a correctable "mistake of fact" for purposes of 19 U.S.C. § 1592 and 19 C.F.R. § 173.4. Accordingly, the Court denies summary judgment for the Government and finds that a trial is necessary on the issue of whether Chrysler was mistaken as to

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[17] Had Chrysler only alleged and shown an "other inadvertence," however (as opposed to a "mistake of fact"), its subsequent failure to submit the required documents and file a protest within ninety days of liquidation might have precluded it from relief under § 1520(c)(1). *See Aviall*, 70 F.3d at 1250 (holding that "repeated failures to respond to clear notice in the *AT&T* and *Occidental* cases fall outside the scope of inadvertence"); *Ford Motor Co.*, 157 F.3d at 860 (stating that "'inadvertence' does not stretch so far as to encompass intentional or negligent inaction").

That an importer's failure to correct a known omission within ninety days of liquidation might deprive it of subsequent recourse to § 1520(c)(1), while such a failure would not have similar effect in the case of a known "mistake of fact," stems from the different breadth that these terms have been accorded. Inadvertence has been recognized as "broader in scope than mistake," and has been defined as "an oversight or involuntary accident, or the result of inattention or carelessness, and even as a type of mistake." *C.J. Tower*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399. Given the scope of this definition, whether a plaintiff acted timely to correct its inattention or carelessness, after becoming aware of the error, must necessarily be considered in deciding whether the plaintiff committed a correctable "inadvertence." To do otherwise would essentially give importers one year to submit proper documentation in every instance where they had been careless or inattentive at entry, regardless of other circumstances — a result which would largely eviscerate many of Customs' reporting requirements. *See Aviall*, 70 F.3d at 1250 (finding that "repeated failures to respond to clear notice * * * fall[s] outside the scope of inadvertence," and that decisions recognizing this fact "reflect a balance between the liberal scope of correction in section 1520 and the responsibilities of an importer to comply with Custom's lawful requirements"). In contrast, and in light of the more limited definition of what constitutes a "mistake of fact," an inquiry into the timeliness with which an importer sought to correct its factual error is independent from, and irrelevant to, whether an importer or Customs "understood the facts to be other than they are," *C.J. Tower*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399.

the origin of the Cummins engines when it entered the Clubcab trucks into the United States.[18]

IV

CONCLUSION

For the foregoing reasons, the Court finds there to be genuine issues of material fact in dispute concerning (a) whether Chrysler de Mexico committed a clerical error or other inadvertence by not following Chrysler's purchasing policy; and (b) whether Chrysler itself committed a mistake of fact by being mistaken as to the U.S. origin of the Cummins engines when it entered the Clubcab trucks into the United States. The parties' respective motions for summary judgment are therefor denied.

(Slip Op. 00–13)

THE TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND L & S BEARING CO., PEER BEARING CO., AND SHANGHAI GENERAL BEARING CO., LTD., DEFENDANT-INTERVENORS

Court No. 97–03–00394

(Dated February 8, 2000)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results"), *Timken Co. v. United States,* 23 CIT ___, 59 F. Supp. 2d 1371 (1999), and Commerce having complied with the Court's remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by commerce on December 13, 1999, are affirmed in their entirety; and it is further

ORDERED that since all other issues having been previously decided, this case is dismissed.

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[18] Under § 1520(c)(1) and 19 C.F.R. § 173.4(b)(2), an importer is only entitled to relief when its clerical error, mistake of fact, or other inadvertence is "adverse to the importer." There is no dispute that this requirement was met in this case. *See* Plaintiff's and Defendant's Joint Statement Pursuant To The Court's Order of January 14, 2000 (stipulating that "in the event that the court determines that there was a mistake of fact by Plaintiff, the alleged mistake of fact was 'adverse to the importer' for purposes of 19 U.S.C. §1520(c)(1) and 19 C.F.R. §173.4(b)(2)"). Thus, there is no need to address this issue at trial.

(Slip Op. 00–14)

FUJIAN MACHINERY & EQUIPMENT IMPORT & EXPORT CORP. AND SHANDONG MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 96–05–01340

(Dated February 8, 2000)

JUDGMENT ORDER

GOLDBERG, *Judge:* Upon consideration of the Department of Commerce's *Final Results of Redetermination Pursuant to Court Remand, Fujian Machinery and Equipment Import & Export Corp., et. al v. United States*, November 15, 1999 ("Remand Results"), and all other papers filed herein, and no parties having filed comments regarding the Remand Results, it is hereby

ORDERED that the Remand Results are sustained in all respects.

(Slip Op. 00–15)

FUJIAN MACHINERY & EQUIPMENT IMPORT & EXPORT CORP. AND SHANDONG MACHINERY IMPORT & EXPORT CORP., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 96–10–02480

(Dated February 8, 2000)

JUDGMENT ORDER

GOLDBERG, *Judge:* Upon consideration of the Department of Commerce's *Final Results of Redetermination Pursuant to Court Remand, Fujian Machinery and Equipment Import & Export Corp., et. al v. United States*, November 15, 1999 ("Remand Results"), and all other papers filed herein, and no parties having filed comments regarding the Remand Results, it is hereby

ORDERED that the Remand Results are sustained in all respects.

(Slip Op. 00–16)

SIGMA CORP., U.V. INTERNATIONAL, SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., LONG BEACH IRON WORKS, INC., OVERSEAS TRADE CORP., D&L SUPPLY CO., DEETER FOUNDRY, INC., ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY CO., BINGHAM & TAYLOR DIVISION, VIRGINIA INDUSTRIES, INC., CAMPBELL FOUNDRY CO., CHARLOTTE PIPE & FOUNDRY CO., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., PINKERTON FOUNDRY INC., TYLER PIPE INDUSTRIES, INC., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND D&L SUPPLY CO. AND DEETER FOUNDRY, INC., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 91–02–00154

SIGMA CORP., SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., LONG BEACH IRON WORKS, INC., OVERSEAS TRADE CORP., GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP., U.S. FOUNDRY & MANUFACTURING CO., ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY CO., BINGHAM & TAYLOR DIVISION, VIRGINIA INDUSTRIES, INC., CHARLOTTE PIPE & FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., TYLER PIPE INDUSTRIES, INC., AND VULCAN FOUNDRY, INC., PLAINTIFFS AND U.V. INTERNATIONAL, PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP. AND U.S. FOUNDRY & MANUFACTURING CO., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–04–00283

Plaintiffs/defendant-intervenors D&L Supply Co. ("D&L") and Guangdong Metals & Minerals Import & Export Corporation ("Guangdong") contest the Department of Commerce, International Trade Administration's ("Commerce") results in *Amended Final Results of Redetermination Pursuant to Court Remand, Sigma Corp. v. United States, Consol. Court Nos. 91–02–00154, 92–04–00283 ("Remand Results")* (Jan. 30, 1998). Specifically, D&L claims that Commerce erred in: (1) including freight costs in import values in addition to those for ocean and foreign inland freight; (2) employing a method to calculate the antidumping percentage that overstated the margin percentage; and (3) overstating the packing expenses. Guangdong claims that Commerce erred in: (1) including freight costs in import values in addition to those for ocean and foreign inland freight; (2) overstating the factory overhead percentage; (3) employing a method to calculate the antidumping percentage that overstated the margin percentage; and (4) overstating the packing expenses. D&L and Guangdong request another remand to correct the errors.

Plaintiffs/defendant-intervenors Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry, Inc., Tyler Pipe Industries, Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc. (collectively "domestic industry") also contest Commerce's *Remand Results* and request another remand. The domestic industry claims that Commerce understated the factory overhead percentage.

Held: D&L's request for a remand is denied. Guangdong's request for a remand is denied. The domestic industry's request for a remand is denied.

[*Remand Results* are affirmed in all respects.]

(Dated February 10, 2000)

Ross & Hardies (Jeffrey S. Neeley) for plaintiff Overseas Trade Corporation.

White & Case (Walter J. Spak, Vincent Bowen and *Edmund W. Sim)* for plaintiffs Sigma Corporation, Southern Star, Inc., City Pipe and Foundry, Inc., Long Beach Iron Works, Inc. and for plaintiff/plaintiff-intervenor U.V. International.

Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal, Mary T. Staley and *Robin H. Gilbert)* for plaintiffs/defendant-intervenors Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry Inc., Tyler Pipe Industries, Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis*, Assistant Director, and *Reginald T. Blades, Jr.);* of counsel: *Linda S. Chang*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Cameron & Hornbostel LLP (Dennis James, Jr.) for plaintiffs/defendant-intervenors D&L Supply Co. and Guangdong Metals & Minerals Import & Export Corporation.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs/defendant-intervenors D&L Supply Co. ("D&L") and Guangdong Metals & Minerals Import & Export Corporation ("Guangdong") contest the Department of Commerce, International Trade Administration's ("Commerce") results in *Amended Final Results of Redetermination Pursuant to Court Remand, Sigma Corp. v. United States, Consol. Court Nos. 91-02-00154, 92-04-00283, ("Remand Results")* (Jan. 30, 1998). Specifically, D&L claims that Commerce erred in: (1) including freight costs in import values in addition to those for ocean and foreign inland freight; (2) employing a method to calculate the antidumping percentage that overstated the margin percentage; and (3) overstating the packing expenses. Guangdong claims that Commerce erred in: (1) including freight costs in import values in addition to those for ocean and foreign inland freight; (2) overstating the factory overhead percentage; (3) employing a method to calculate the antidumping percentage that overstated the margin percentage; and (4) overstating the packing expenses. D&L and Guangdong request another remand to correct the errors.

Plaintiffs/defendant-intervenors Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry, Inc., Tyler Pipe Industries, Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc. (collectively "domestic industry") also contest Commerce's *Remand Results* and request another remand. The domestic industry claims that Commerce understated the factory overhead percentage.

BACKGROUND

On September 8, 1997, the Court issued orders remanding consolidated court numbers 91–02–00154 and 92–04–00283 to Commerce.[1] *See Sigma Corp. v. United States ("Sigma I")*, Slip Op. No. 97–125, 1997 WL 739595 (CIT Sept. 8, 1997); *Sigma Corp. v. United States ("Sigma II")*, Slip Op. No. 97–126, 1997 WL 739611 (CIT Sept. 8, 1997). The remand was ordered pursuant to the decision (July 7, 1997) and mandate (Aug. 29, 1997) of the Court of Appeals for the Federal Circuit ("CAFC"), directing Commerce to: (1) recalculate the value of the freight component of foreign market value ("FMV") for the 1987–89 and 1989–90 reviews; (2) adequately support its determination of surrogate factory overhead for the 1989–90 review; and (3) replace the invalidated dumping margin as the value for the best information available for the 1989–90 review.

On December 12, 1997, Commerce released draft remand results in this action and invited interested parties to comment. After receiving comments from certain United States importers and from the domestic industry, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, Sigma Corp. v. United States, Consol. Court Nos. 91–02–00154, 92–04–00283* (Jan. 21, 1998). Commerce subsequently released the *Amended Final Results of Redetermination Pursuant to Court Remand, Sigma Corp. v. United States, Consol. Court Nos. 91–02–00154, 92–04–00283 ("Remand Results")* (Jan. 30, 1998) upon discovering and correcting a clerical error.

D&L, Guangdong and the domestic industry contest the *Remand Results* and request another remand. The issue before the Court is whether the *Remand Results* complied with the remand instructions contained in the orders issued by the Court pursuant to the decision and mandate of the CAFC.[2]

JURISDICTION

The Court retains jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

The Court will uphold Commerce's final results of redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

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[1] Consolidated court number 91–02–00154 involves Commerce's final results for the 1987–89 administrative review of the *Antidumping Duty Order; Iron Construction Castings From the People's Republic of China (the PRC)*, 51 Fed. Reg. 17,222 (May 9, 1986). *See Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 2,742 (Jan. 24, 1991). Consolidated court number 92–04–00283 involves Commerce's final results for the 1989–90 administrative review. *See Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China*, 57 Fed. Reg. 10,644 (Mar. 27, 1992). Since both cases involve almost identical facts and because the Court of Appeals for the Federal Circuit considered the cases together, this Court will consider and refer to them as a single matter. The Court, however, will not address every aspect of this case's long procedural history. Only those details relevant to the matters at issue will be discussed.

[2] Since the administrative reviews at issue were initiated before January 1, 1995, the applicable law is the antidumping statute as it existed prior to the amendments made by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

DISCUSSION

I. *Freight Costs*

The CAFC determined that the method used by Commerce to calculate the freight component of FMV resulted in overstatement of that value. *See Sigma Corp. v. United States* ("*Sigma III*"), 117 F.3d 1401, 1407 (Fed. Cir. 1997). The CAFC described Commerce's method as follows:

> [Commerce] started with the import price of pig iron in the [surrogate country], *i.e.*, the price of pig iron delivered to port in the [surrogate country], with foreign inland and ocean freight expenses already included. Commerce then ascertained the distance from the pig iron mill in China to the foundry and added a constructed freight cost for that distance to the [surrogate country] import price.

Id. The CAFC criticized Commerce's assumption that the price of domestically produced pig iron was equal to the import price and "that [,therefore,] a Chinese iron castings manufacturer would purchase domestic pig iron at the import price, rather than imported pig iron at the import price, regardless of the respective freight costs for inland transportation of the domestic and imported pig iron." *Id.* at 1408. The CAFC reasoned that instead, a manufacturer would minimize its costs "by purchasing imported pig iron if the cost of transportation from the port to the foundry were less than the cost of transportation from the domestic pig iron mill to the foundry." *Id.* Accordingly, this Court ordered Commerce to recalculate constructed FMV using a method that does not double-count ocean freight and foreign inland freight. *See Sigma I*, at *1; *Sigma II*, at *1.

On remand, Commerce altered its method of valuation. Commerce described its method in the *Remand Results* as follows:

> [A]ll [pig iron] inputs were revalued to include the surrogate CIF price plus a value for freight based on the shorter of the reported distances from either the closest PRC seaport to the castings foundry or from the PRC domestic materials supplier to the foundry.[3]

Remand Results at 3.

The Court finds that Commerce's decision to add a freight value based on the reported distances in China to the surrogate CIF price was supported by substantial evidence.[4] As the government states, adding to CIF price "an amount for inland freight in China from the nearest of the place of importation or the actual supplier represents a market value for providing the input to the manufacturer at the location of that manufacturer's plant." Def.'s Reply Comments Upon the Remand Results ("Def.'s Comments") at 4.

Contrary to the contentions of D&L and Guangdong, the CIF surrogate price alone does not properly account for the entire cost of freight.

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[3] The CIF (cost, insurance and freight) import price includes ocean and foreign inland freight. *See Amended Final Results of Redetermination Pursuant to Court Remand, Sigma Corp. v. United States, Consol. Court Nos. 91–02–00154, 92–04–00283*, p. 10 (Jan. 30, 1998).

[4] Using both surrogate and actual values to determine foreign market value in a nonmarket economy country is permitted under 19 U.S.C. § 1677b (1988). *See Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994).

See Def.-Intervenor D&L Supply Co.'s Comments on the Remand Results ("D&L's Comments") at 2; Def.-Intervenor Guangdong Metals & Minerals Import & Export Corp.'s Comments on the Remand Results ("Guangdong's Comments") at 3. The CIF import price "includes the inland freight required to transport materials from the point of production to the point of export, and, the ocean freight required to transport the goods from the country of origin" to the surrogate country. *Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 2,742, 2,746 (Jan. 24, 1991). Thus, this price represents the cost to get the raw materials to the Chinese port, but it does not include the freight cost incurred by a producer to get the materials from the Chinese port to the castings foundry. The inland freight cost is necessary to account for that additional transportation cost.

Furthermore, the CAFC did not instruct that any freight in addition to ocean and foreign inland freight be eliminated altogether; rather, it objected to the particular method chosen by Commerce to calculate the freight component of FMV. Specifically, the CAFC stated:

> Simply put, the import prices in the [surrogate country] already included ocean freight and foreign inland freight, a substantial portion of the total cost of transporting imported pig iron from the pig iron mill to the foundry. By adding a constructive freight charge *for the entire trip from the mill to the foundry in China* on top of the import prices in the [surrogate country], Commerce's methodology double-counted a substantial component of the total freight expense.

Sigma III, 117 F.3d at 1407–08 (emphasis supplied). Thus, the CAFC rejected Commerce's approach of adding a freight cost for the entire trip from the mill to the foundry in China on top of the CIF import price. Commerce's method in the *Remand Results* eliminates this concern since it adds only that portion for freight not already accounted for in the CIF price—the cost of transporting pig iron from the port to the castings foundry. Because Commerce's method of calculating freight is supported by substantial evidence, Commerce is affirmed.

II. *Factory Overhead Percentage*

In 1991, Commerce obtained a cable from the United States embassy in Pakistan containing information on overhead rates at castings foundries in that country. *See Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China*, 57 Fed. Reg. 10,644, 10,645 (Mar. 27, 1992). The cable data pertained to the cost breakdown for "a large Lahore-based foundry," which Commerce had used to calculate the surrogate overhead value for Guangdong's foundries. *Remand Results* at 4–5. There was, however, no definite way to ascertain whether the Lahore-based foundry was comparable in size to the Guangdong foundries and, therefore, whether the use of the Lahore-based foundry data to calculate the Guangdong surrogate values was appropriate. Consequently, the CAFC

determined that Commerce's use of the single cable to calculate the surrogate value for the factory overhead component of FMV was not supported by substantial evidence. *See Sigma III*, 117 F.3d at 1410. This Court remanded the matter and ordered Commerce to obtain more information

> from its representatives in Pakistan with regard to the size of the "large Lahore-based foundry," and whether the overhead for that foundry is comparable to the overhead that would be experienced by a foundry the size of Guangdong's foundries and, if necessary based on this information, recalculate the surrogate foundry overhead component of constructed foreign market value.

Sigma II, at *1.

On remand, Commerce adjusted the values obtained in the 1991 cable to account for foundry size. *See Remand Results* at 5. Commerce made the adjustments by relying on two facsimiles received from the United States embassy in Pakistan in 1997 during the course of its investigation. *See id.* at 5–6. In the first facsimile, dated November 19, 1997, the embassy conveyed that it had contacted "'possibly the largest Lahore-based foundry,'" but did not know whether this was the foundry referenced in the 1991 cable. *Id.* at 5. The embassy learned that the foundry has a production capability of 25,000 metric tons per month and overhead rates ranging from 15 to 20 percent. *See id.* The foundry estimated that small foundries, defined as ones capable of producing two to ten metric tons per month, would have overhead rates from 5 to 10 percent. *See Remand Results* at 5.

The second facsimile, dated December 9, 1997, contained a letter from the Pakistan Steel Melters' Association that provided information about the sizes of foundries in Pakistan. *See id.* at 6. The letter clarified the 1991 cable by conveying that: (1) large foundries are capable of producing more than 500 metric tons per month; (2) medium foundries are capable of producing 100 to 500 metric tons per month; and (3) small foundries, or mini-foundries, produce up to 100 metric tons per month. *See id.*

Commerce classified Guangdong's foundries by size, according to the information contained in the Steel Melters' Association letter. *See id.* at 6–7. Thus, depending on their production capabilities, three of the foundries were classified as medium and one as small. *See Remand Results* at 7. Based on the size of the foundries, Commerce calculated overhead rates as follows:

> Because the 1991 cable tells us that overhead rates for small foundries are 20–30 percent and that overhead rates for large foundries are 40–50 percent, we can reasonably infer that the medium-size factories would have an overhead range of between 30 and 40 percent. We based this inference on the fact that both the 1991 cable and the information submitted by the U.S. Embassy on November 19, 1997 reflect approximately the same proportion between the overhead rates for small foundries and those for large foundries. The 23.75 percent overhead rate used in the underlying

> review is based on the most specific information available to the Department. However, in light of the information discussed above, for these final results of redetermination, we have concluded that the 23.75 percent overhead rate calculated for the 1989–90 review period was taken from a large foundry and have assumed that this foundry represents the median of the large firms that the 1991 cable referenced as having overheads of 40–50 percent. In order to extrapolate what the overhead rate would be for a medium and a small foundry based on similarly specific information, we adjusted the 23.75 percent figure to reflect the size of Guangdong's foundries. For Guangdong's small foundry, we calculated overhead as (23.75%/45) X 25, *i.e.* 13.19 percent. For each of Guangdong's medium size foundries, we calculated overhead as (23.75%/45) X 35, *i.e.* 18.47 percent.

Id. at 7–8.

The domestic industry disputes Commerce's inference that overhead costs incurred by medium foundries are higher than those incurred by small foundries and lower than those incurred by large foundries, arguing that medium foundries could incur higher costs than small foundries because they are family-run and higher costs than large foundries because they can take advantage of economies of scale. *See* Domestic Industry's Comments on the Commerce Department's Final Results of Redetermination Pursuant to Court Remand ("Domestic Industry's Comments") at 2. The domestic industry, however, offers no evidence in support of these contentions. The domestic industry continues to maintain that the overhead costs of the large Lahore foundry of 23.75 percent constitute the best information available. *See id.*

Guangdong, on the other hand, maintains that the overhead rate is still not low enough. *See* Guangdong's Comments at 5. Guangdong protests that any comparison of its foundries to the Lahore-based foundry is completely inappropriate given the difference in size between them. Guangdong's Comments at 11. Guangdong believes that "[w]hile the adjustments undertaken by Commerce ameliorated to some degree the disparities, the adjustments did not create comparability." *Id.* at 11. Guangdong complains that Commerce ignored superior data on Indian overhead costs that Guangdong had submitted. *See id.* at 7. Guangdong believes that Commerce also could have used the overhead data in the Pakistan Steel Melters' Association letter, from which Commerce had extracted the foundry size data. *See id.* at 9–10. Commerce explained its rationale for not using the new data by stating:

> We used values from the 1991 cable, rather than values obtained in the course of the remand, because the 1991 cable contained information contemporaneous with the period of review, and because the components of factory overhead for the "large Lahore based foundry" referenced in the 1991 cable are detailed, whereas none of the more recent information gathered from Pakistan for the remand provides such a breakdown for any size foundry.

Remand Results at 5.

The Court finds that Commerce's determination was supported by substantial evidence. The basic premise of Commerce's analysis comes from the 1991 cable, which indicates that foundry size affects overhead and that larger foundries incur greater overhead costs than smaller foundries. *See Remand Results* at 7. Commerce obtained new information during the course of its investigation and utilized that information to adjust the overhead values of the Guangdong foundries. *See id.* Specifically, Commerce reduced the overhead figure derived in 1991 to account for the assumption that the 1991 figure was derived from a large foundry, while the Guangdong factories were smaller. *See id.* at 7–8. Such action was permissible according to both the mandate of the CAFC and the remand order by this Court. *See Sigma III*, 117 F.3d at 1410; *Sigma II*, at *1.

Although the Lahore and the Guangdong foundries are incongruous with respect to size, they are alike in other significant respects. For example, the 1991 data is contemporaneous with the period of review, and it is also specific to the iron castings industry. The components of the Lahore foundry overhead calculation, that is, depreciation of machinery, production overhead, refractories and molding costs, were known and could be compared to Guangdong's overhead components. These similarities between the Lahore and Guangdong foundries are necessary, since keeping as many factors constant between the Guangdong and Lahore foundries ensures that a fair comparison can be made even when the data is adjusted for size. As the government states, "[t]hese 'details', which make the overhead calculation specific to the type of casting operation that would produce iron construction castings * * * provide Commerce with assurance that the overhead value includes items closely associated with the castings process used by Guangdong's suppliers." Defendant's Comments at 8–9. Thus, once the Lahore data is adjusted for size, it is reasonable to assume that it is applicable to the Guangdong foundries.

Guangdong vehemently protests the use of the Pakistani data, believing that Commerce should have used the Indian data obtained during the course of the 1997 investigation instead. *See* Guangdong's Comments at 16. The proper inquiry upon review of Commerce's determination, however, is whether the particular actions Commerce took were supported by substantial evidence, not whether Commerce could have used an alternative method or different information. Thus, "the question is whether the record adequately supports the decision of the ITA, not whether some other inference could reasonably have been drawn." *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993); *see also Torrington Co. v. United States*, 21 CIT ____, ____, 965 F. Supp. 40, 42 (1997) ("It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.") (citation omitted). "Nor does it mean that even as to matters not requiring expertise a court may displace [Commerce's] choice between two fairly con-

flicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Because Commerce's determination was supported by substantial evidence, Commerce is affirmed.

III. *Antidumping Percentage*

D&L and Guangdong maintain that Commerce incorrectly calculated the antidumping percentage, resulting in an overstatement of the margin. *See* D&L's Comments at 5; Guangdong's Comments at 16. Specifically, they claim that the entered value formula was incorrect because the denominator used in calculating the dumping percentage erroneously contained the value for foreign inland freight. *See* D&L's Comments at 5–6; Guangdong's Comments at 17–18.

D&L and Guangdong had multiple opportunities to raise this argument before Commerce and before this Court and failed to do so. The government, therefore, claims that D&L and Guangdong should not be permitted to raise the issue at this late stage of the proceedings. *See* Def.'s Comments at 13. D&L and Guangdong admit that the error could have been found earlier. *See* D&L Supply Company's and Guangdong Metals & Minerals Import & Export Corporation's Rebuttal to Defendant's Reply Comments Upon the Remand Results ("Rebuttal") at 14.

The issue before the Court, therefore, involves determining the proper juncture in the administrative and judicial process at which claims need to be raised in order to be decided on their merits. The Court agrees with the government that D&L and Guangdong should not be permitted to raise this issue. "It is well established that '[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'" *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452, 773 F. Supp. 1549, 1554 (1991) (quoting *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)); *see AIMCOR v. United States*, 141 F.3d 1098, 1111 (Fed. Cir. 1998) (Party was precluded from raising "issue *de novo* before the court when it failed to present the issue during the applicable comment period."); 28 U.S.C. § 2637(d) (1988) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). Because D&L and Guangdong could have brought this issue before Commerce during multiple earlier opportunities and failed to do so, the Court will not consider it on its merits.

IV. *Packing Value*

D&L and Guangdong protest Commerce's refusal to correct alleged errors in the packing expenses used to calculate each company's FMV. *See* Rebuttal at 15. The parties claim that packing expenses are calculated as a percentage of the cost of manufacture ("COM") and that every time an input such as the cost of freight changes, the COM changes. *See* D&L's Comments at 10. They argue, therefore, that the cost of packing should be automatically adjusted as are other percentages of prior costs.

See id. D&L and Guangdong also claim that because the packing value should change automatically, it was not necessary to raise this issue earlier. *See id.*

D&L and Guangdong had brought this issue before Commerce after issuance of the Draft Remand Results. Commerce responded that

> [b]ecause the packing adjustment is not directly affected by the recalculation of inland freight, because these respondents did not timely raise this issue before the Court, and because the Court has not included such a change in the remand order, in the interest of finality the Department has not made this change.

Remand Results at 20. Commerce maintains that "the same constant values, rather than a percentage of COM, have been part of the programming with respect to the packing adjustment since the final results of the original reviews, for which programs were created in 1991." Def.'s Comments at 14. Commerce claims that because D&L and Guangdong failed to raise this argument in the original suit, before Commerce during the 1994 remand or in their comments to the Court following the 1994 remand, Commerce "continued to use the constant amounts, rather than the 'COM times 1.5 percent' formula, in the final results of remand." *Id.* at 16.

The Court will not reach the merits of D&L and Guangdong's contentions. D&L and Guangdong maintain that the packing expense should be calculated as a percentage of COM, while Commerce applied the packing figure as a constant value. Thus, there is a fundamental dispute concerning the type of methodology Commerce should have used in calculating packing expenses and whether it resulted in error. Because the dispute centers on whether Commerce's method was erroneous, the Court cannot simply order that the expenses be recalculated.

The dispute concerning methodology is exactly the type of claim that D&L and Guangdong should have brought forth earlier in this case's long procedural history. The Court is not persuaded by D&L and Guangdong's argument that "[i]t was only when the COM was reduced significantly as a result of the remands that the error became noticeable—as well as meaningful." Rebuttal at 16. "Judicial economy, fairness to the parties and the need to fulfill Congress's intent of prompt resolution of these matters requires that errors of methodology, data selection, calculation, etc. all be raised at the outset, unless some extraordinary factor supports relief at a later date." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1062 (Fed. Cir. 1992) (citation omitted). There is no such extraordinary factor here. Although ensuring the accuracy of final determinations is one countervailing factor,[5] here, it is greatly outweighed by considerations of fairness and finality, especially since D&L and Guangdong had several opportunities to discover and contest the alleged error. To allow the parties to bring an overdue claim simply because they did not notice the allegedly erroneous calculation provides no incentive for

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[5] *See Serampore Indus. Pvt. Ltd. v. United States*, 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988).

the parties to perform a diligent review of the record and to raise claims at the earliest reasonable opportunity.

Because the issue pertaining to packing expenses was not timely raised, the Court will not consider it on its merits. Commerce is affirmed.

CONCLUSION

Commerce has abided by the Court's instructions on all matters, including that pertaining to the "all others" rate. *See Sigma II*, at *1; *Remand Results* at 8. Commerce's determination is affirmed in its entirety. Because all other issues have been previously decided, this case is hereby dismissed.

(Slip Op. 00–17)

THAI PINEAPPLE CANNING INDUSTRY CORP., LTD., AND MITSUBISHI INTERNATIONAL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND MAUI PINEAPPLE CO., LTD., INTERNATIONAL LONGSHOREMEN'S, AND WAREHOUSEMEN'S UNION, DEFENDANT-INTERVENORS

Court No. 98–03–00487

[ITA remand results affirmed in part, reversed and remanded in part.]

(Dated February 10, 2000)

Dickstein Shapiro Morin & Oshinsky LLP (Arthur J. Lafave III, Douglas N. Jacobson, and *Patricia M. Steele)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau), Christine E. Savage*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal and *David C. Smith, Jr.)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* On May 5, 1999, the court remanded the final results of the Department of Commerce, International Trade Administration ("Commerce" or "the Department") in *Canned Pineapple Fruit from Thailand*, 63 Fed. Reg. 7,392 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) [hereinafter "*Final Results*"]. *See Thai Pineapple Canning Indus. Corp. v. United States*, No. 98–03–00487, 1999 WL 288772 (Ct. Int'l Trade May 5, 1999) [hereinafter "*Thai Pineapple*"].[1] The case concerned a challenge by Thai Pineapple Canning Industry Corp., Ltd. ("TPC") and Mitsubishi International Corp. ("MIC")

[1] Familiarity with the court's earlier opinion is presumed.

(collectively "TPC") to the Department's *Final Results*. In its remand instructions, the court instructed Commerce to (1) reconsider the date of sale, (2) reconsider the matching of costs to sales on a fiscal year basis for cost of production ("COP") and constructed value ("CV") purposes, and (3) recalculate the constructed export price ("CEP") profit calculation. *Thai Pineapple*, 1999 WL 288772, at *11. Because neither TPC nor Commerce had an adequate opportunity to address the assessment rate of entries made after the final determination in the original less-than-fair-value investigation, that issue was remanded to provide the parties a further opportunity to brief the issue. *Thai Pineapple*, 1999 WL 288772, at *2. The court upheld Commerce's use of a single assessment rate for the period of review ("POR"). *Id.* at *10–11.

Commerce issued its remand determination on September 2, 1999. *See Final Results of Redetermination Pursuant to Court Remand: Thai Pineapple Canning Industry Corp., Ltd., and Mitsubishi International Corp. v. United States, Court No. 98–03–00487* [hereinafter "*Remand Results*" or "*RR*"].

Jurisdiction and Standard of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

I. *Date of Sale*

A. *Background*

In the *Final Results*, Commerce used the date of contract for purposes of determining the date of sale for export price ("EP") sales and third country sales. *Final Results*, 63 Fed. Reg. at 7,394–95. The court found that Commerce's policy as of the time of its review of TPC was to use invoice date for date of sale, absent a significant reason to do the contrary. *See Thai Pineapple*, 1999 WL 288772, at *5–6. The court therefore remanded for Commerce to state whether there was "another reason for rejecting invoice date" and to "square its reasoning with its other contemporaneous determinations." *Id.* at *6. In the *Remand Results*, Commerce reconsidered the date of sale determination, and again concluded that "contract date remains the appropriate date of sale for TPC's third country sales, based on the record in this case." *RR*, at 13. The Department states that this decision is consistent with its date of sale methodology in contemporaneous determinations. *Id.*

B. *Discussion*

TPC argues that Commerce has not provided an adequate explanation for not utilizing invoice date as date of sale in its remand determination.

The Department announced a new policy, applicable to this case, of using invoice date for date of sale unless there is information indicating that date of contract should be used because all material terms of the

sale were firmly fixed at that time. *See Thai Pineapple*, 1999 WL 288772, at *5. This policy is now reflected in Commerce's regulations.[2] 19 C.F.R. § 351.401(i) (1999).

The announced policy was not applied to this matter although it was applied to other contemporaneous matters. *See Thai Pineapple*, 1999 WL 288772, at *6. The new rule establishes a presumption that invoice date will be the date of sale. *See* 19 C.F.R. § 351.401(i). If Commerce can establish "a different date [that] better reflects the date on which the exporter or producer establishes the material terms of sale," Commerce may choose a different date. *Id.* Commerce has cited nothing of substance which indicates sales terms were fixed at an earlier date. Nor has it cited any other credible reason for disregarding its announced presumption. *See Antidumping Duties; Countervailing Duties—Final Rule*, 62 Fed. Reg. 27,296, 27,349 (Dep't Commerce 1997) (invoice date presumption applies "absent satisfactory evidence that the terms of sale were finally established on a different date.") Commerce does not cite industry practice or a lag between invoice and shipment, or any other unusual situation, indicating a date, other than invoice date should be used. There appears to be no other case in which "rare instances" of changes after contract date, *RR*, at 17, was considered substantial reason to abandon the invoice date presumption. Under the facts of this case, i.e., rising pineapple costs, the fact that few purchasers sought changes is meaningless. The question is could the terms be changed, or were they fixed at the time of the initial order. *See Final Results*, 63 Fed. Reg. at 7,394. The evidence is that the terms could be changed and were changed in some instances. *See Thai Pineapple*, 1999 WL 288772, at *4 & n.11. There was no reason for Commerce to abandon its presumption in this matter. The court therefore reverses Commerce's use of date of contract and directs the Department to use invoice date for date of sale purposes.

II. *Use of Single Weighted-Average Cost of Production Covering Entire 18-Month Period of Review*

A. *Background*

In the *Final Results*, for COP and CV purposes, Commerce used a single weighted-average cost for the entire POR. *Final Results*, 63 Fed. Reg. at 7,399. TPC argued that this single weighted-average cost failed to take into account the rising cost of fresh pineapple fruit from 1994 through the POR. *Id.* TPC alleged that this resulted in significant distortions in Commerce's price-cost comparisons. *Id.*

The court found that the use of the single weighted-average cost did not take into account the significant rise in the cost of pineapple fruit, the primary input of canned pineapple fruit ("CPF"). *Thai Pineapple*,

[2] Commerce at times states that the policy reflected its then current practice. Thus, the court assumes its practice had evolved over time. *See also Antidumping Duties; Countervailing Duties—Notice of Proposed Rulemaking and Request for Public Comments*, 61 Fed. Reg. 7,308, 7,330 (Dep't Commerce 1996) ("This is a change from prior practice under which the Department based the date of sale on the date on which the 'essential terms of sale' (normally price and quantity) were established").

1999 WL 288772, at *3.[3] The court also found that Commerce had previously "adjusted for changes in costs over the POR or matched costs to POR sales more specifically than it did here." *Id.* The court noted that in *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996), the Federal Circuit sustained the use of annual weighted-average COP in calculating FMV, and that this was what TPC was seeking: "they want costs for a fiscal year matched to sales for a fiscal year." *Thai Pineapple*, 1999 WL 288772, at *3. The court instructed Commerce to revisit the issue and "reanalyze the data to determine whether TPC has provided sufficient data to match costs to appropriate fiscal year sales. If it has, in the absence of any proper antidumping policy reason * * * Commerce must proceed as it has in the past and match fiscal year costs with sales." *Id.* at *4.

On remand, Commerce recalculated separate costs for fiscal years 1995 and 1996. *Remand Results*, at 11. "Where CV is the basis for normal value, we have matched 1995 U.S. sales to 1995 CVs, and have matched 1996 U.S. sales to 1996 CVs. With respect to the sales-below-cost test, we have tested 1995 comparison market sales against 1995 costs, and have tested 1996 comparison market sales against 1996 costs." *Id.* Third country sales made in December 1994, and used in the margin calculation, were tested against 1995 costs. *Id.* Commerce stated that it believed 1995 annual costs were representative of December 1994, "and that the use of December 1994 sales pursuant to the contemporaneity requirement does not warrant a departure from our practice of using POR costs." *Id.* TPC argues that the failure to use 1994 costs does not conform to the court's remand instructions. Commerce counters that its longstanding policy is to use costs incurred during the POR for its COP and CV costs analysis. *Remand Results*, at 12.

B. *Discussion*

The matching of costs actually puts two issues before the court: 1) the basis on which sales must be matched to costs (i.e. fiscal year, semi-annually, etc.) and 2) whether costs incurred outside of the POR, or period of investigation ("POI"), should be matched to the sales made during the same year whether or not the sales are within the POI or the POR. The court ruled on the first issue in *Thai Pineapple*, and on remand Commerce generally used fiscal year costs. The court finds that the use of fiscal year costs adequately addresses the issue of TPC's rising pineapple costs, and sustains the use of separate weighted-average costs for 1995 and 1996. The Department's decision to use only POR costs, however, now raises the second issue.

Sections 1677b(b)(3)(A) and 1677b(e)(1) of Title 19 require that in calculating COP and CV, the Department use costs "during a period which would ordinarily permit the production" of the foreign like product or the merchandise, "in the ordinary course of business." 19 U.S.C.

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[3] The court noted TPC's calculations reflecting a [ ]% rise in fresh pineapple costs per carton of CPF from 1994 to 1995 and a [ ]% increase from 1994 to 1996. The price per standard carton in 1994 was [ ] baht, [ ] baht in 1995 and [ ] baht in 1996. *Thai Pineapple*, 1999 WL 288772, at *2, n.4.

§ 1677b(b)(3)(A) & 1677b(e)(1) (1994). The period to be used is not further defined in the statute, nor does the statute dictate the methodology Commerce must use to calculate COP or CV. *See AK Steel Corp. v. United States*, No. 96–05–01312, 1997 WL 728284, at *5 (Ct. Int'l Trade Nov. 14, 1997) (statute does not "address the method by which Commerce must calculate the COM" for either COP or CV). Therefore, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the court must defer to the agency's reasonable interpretation of this statute. Commerce is directed, however, to determine COP as "accurately as possible." *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1239 (Ct. Int'l Trade 1997) (quoting *Timken Co. v. United States*, 18 CIT 1, 10, 852 F. Supp. 1040, 1049 (1994)). Commerce states that its longstanding practice is to use the cost of manufacturing ("COM")[4] during the POI/POR for its COP and CV calculation. The fact that a practice is longstanding, however, is only justification for the practice's use if it is also reasonable and in accordance with law. *See Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp.2d 807, 813–14 (Ct. Int'l Trade 1998) (approving Commerce's test because it was both longstanding and consistent with law).

Commerce analyzes costs based on the cost to produce the merchandise during the period in which sales are being made, "as opposed to the cost to produce each of the particular sales made during the reporting period." *Remand Results*, at 12. Commerce therefore requests that respondents report the weighted average production data based on costs incurred during the POI/POR. *Stainless Steel Bar from Spain*, 59 Fed. Reg. 66,931, 66,938 (Dep't Commerce 1994) (notice of final determination of sales at LTFV). Commerce departs from this practice in unique circumstances, "such as when production did not occur during the period of investigation." *Id.* "[A]bsent strong evidence to the contrary, the Department assumes that the cost structure during the POI is representative and can be used to calculate an estimate of the cost of production." *Id.* Commerce recognizes that the statutory language is broad enough to accommodate calculating COP and CV on a different basis, but it has

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[4] Commerce's standard practice in calculating COP and CV is to use COM, rather than cost of goods sold ("COGS"), because COM "represents the cost to manufacture the product during the period." *Certain Preserved Mushrooms from Indonesia*, 63 Fed. Reg. 72,268, 72,273 (Dep't Commerce 1998) (notice of final determination of sales at LTFV). The Department states that it does not generally use COGS because of concerns over the inclusion of the value of inventory from a previous period. *Id.* COGS is an accounting method used to measure costs. Inventory value is an issue when using COGS because COGS is calculated by "(1) adding the cost of goods manufactured to the beginning finished goods inventory so as to find the total amount available for sale and then (2) subtracting the ending finished goods inventory." Robert N. Anthony & James S. Reece, *Accounting Principles* 146 (6th ed. 1989). Because inventory can be valued in different ways, Commerce expresses concern that costs based on COGS may vary depending on the method selected. Gov't Supplemental Br. at 5 (citing *Accounting Principles* at 151: "the choice of [inventory] method can have a significant effect on net income."). In contrast, using COM during the period "normally covers the period needed to produce the subject merchandise just prior to export and excludes the changes in inventory." *Mushrooms*, 63 Fed. Reg. at 72,273.

The court requested further briefing on the Department's use of COM, rather than COGS, which clarified that TPC did not, in fact, request that Commerce utilize a COGS methodology. Although TPC says that COGS would be a more appropriate methodology, it submitted its costs based on COM for each fiscal year (1994, 1995, and 1996) and it requests that separate fiscal year COM be used for each period. TPC Supplemental Br. at 4, 5, & 9. The court, therefore, need not resolve whether COGS should be used.

chosen to use costs during the POR/POI as a "consistent and predictable approach." *Remand Results*, at 27.

> In some instances, the cost of manufacturing the particular product sold during the POR/POI is higher than the cost of the identical product manufactured during the POR/POI; however, sometimes it is lower. We believe that having a consistent and predictable approach as to which method we use eliminates results-oriented arguments regarding which approach to take in a given case.

Id.

In requesting that Commerce deviate from the standard practice in this case, TPC relies principally on two determinations: *Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan*, 55 Fed. Reg. 34,585 (Dep't Commerce 1990) (final determination of sales at LTFV) [hereinafter "*Sweaters*"] and *Fresh and Chilled Atlantic Salmon from Norway*, 58 Fed. Reg. 37,912 (Dep't Commerce 1993) (final results of antidumping duty admin. rev.) [hereinafter "*Salmon*"]. The court found that these determinations supported an adjustment for changes in costs over the POR and matching costs to sales more closely than was done in the original *Final Results*. *See Thai Pineapple*, 1999 WL 288772, at *3–4.

In *Sweaters*, the Department departed from using annual average unit costs because there was a significant variation between what was produced during the POI and what was sold during the POI. 55 Fed. Reg. at 34,596. Instead the Department used actual costs incurred during the period of production. *Id.* This reasoning, however, does not require using costs from outside the POR in the case of TPC because there was no difference between the CPF produced during the POR and the CPF sold during the POR. In *Salmon*, the Department did not use a single cost of cultivation ("COC") for the entire eighteen month POR. The court discussed *Salmon* in *Thai Pineapple* and found the reasoning in *Salmon* justified a closer matching of costs to sales:

> [G]iven the fluctuations of farmers' costs during the POR, the ease with which different generations' COC can be segregated and the fact that we have calculated separate 1990 and 1991 processing costs for respondent * * * we believe that it is reasonable to use separate 1990 and 1991 COCs.

Thai Pineapple, 1999 WL 288772, at *4 (quoting *Salmon*, 58 Fed. Reg. at 37,913). Commerce's explanation that the particularity of salmon cultivation (a typical salmon harvest averages eighteen to twenty-four months),[5] requires the use of non-POR costs is reasonable. CPF does not have the particularities of the subject merchandise in *Sweaters* or *Salm-*

[5] *Fresh and Chilled Atlantic Salmon from Norway*, 56 Fed. Reg. 7,661, 7,662 (Dep't Commerce 1991) (final determination of sales at LTFV) ("Because the growth cycle of the subject merchandise is approximately 18 to 24 months, we requested production costs for the previous two to three years").

on which would necessitate the use of non-POR costs.[6] Moreover, a closer matching of costs to sales was achieved upon remand in this case.

TPC insists that the Department should have used 1994 COM in the calculation of CV for comparison with U.S. sales of goods manufactured in 1994[7] and for the COP calculation for testing third-country sales of goods manufactured in 1994.[8] TPC Comments at 2. TPC states that sales observations with invoice dates in October through December of 1994 "were excluded pursuant to the sales below cost test." TPC Comments at 6 n.6 & Ex. 1 (citing Commerce's "Below Cost HM Sales" table). TPC alleges that the 1995 costs are not representative of 1994 sales. Although TPC's 1994 weighted-average costs may be somewhat lower than the 1995 costs,[9] this is not an investigation of 1994 sales, and only very year-end 1994 third-country and U.S. sales were used in the margin calculation.[10] *Remand Results*, at 11.

Because the statute permits Commerce to determine the period "which would ordinarily permit the production" of the foreign like product or the merchandise, "in the ordinary course of business," it was not unreasonable, under the facts of this case, for Commerce to select fiscal years within the POR as the relevant period for calculating costs. The court finds that in this case, using separate 1995 and 1996 costs sufficiently accounts for the rising pineapple costs incurred by TPC, and complies with the court's remand instruction to "match fiscal year costs with sales." *Thai Pineapple*, 1999 WL 288772, at *4. The court does not find that the circumstances of this case warrant using costs from outside of the POR, and therefore sustains Commerce's calculation of COP and CV based on 1995 and 1996 COM.

III. *Inclusion of U.S. Interest Expenses in Denominator of CEP Profit Ratio*

A. *Background*

The court found that Commerce's calculation of CEP profit differed from the approach set out in the statute. *Thai Pineapple*, 1999 WL 288772, at *7 (citing 19 U.S.C. § 1677a(f)(1)–(2)(A) (1994)). In the *Final Results*, Commerce calculated CEP profit by computing the ratio of total

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[6] In *Stainless Steel Bar from India*, Commerce also deviated from its usual practice and used cost information from outside the POR because of limited production of the subject merchandise during the POR. 62 Fed. Reg. 4,029, 4,030–31 (Dep't Commerce 1997) (final results of new shipper antidumping duty admin. rev.). Limited production is not a concern in the case of TPC.

[7] Although TPC speaks of goods manufactured in 1994, the record does not reveal in which year goods were manufactured.

[8] TPC had reported five months of third-country sales invoiced in 1994. TPC Br. at 9–10. This was in response to Commerce's request that TPC report all sales in the third-country for a period commencing 90 days prior to the first date of sale in the United States. Because Commerce based date of sale on date of contract, and the date of contract preceded the date of entry into the United States by several months, "the first date of sale on an EP sale to the United States [resulting in an entry] during the POR * * * took place in November 1994 and TPC was required to report sales in Germany commencing with invoices issued in August 1994, 90 days before." TPC Br. at 10, n.25. The "90/60" day contemporaneity window exists because Commerce limits the universe of potential matches to those sales "within 90 days before and 60 days after the month of the U.S. sale." *E.I. DuPont de Nemours & Co. v. United States*, No. 96–11–02509, 1998 WL 42598, at *13 (Ct. Int'l Trade Jan. 29, 1998).

[9] The finished product costs rose by [ ]% from 1994 to the first half of 1996, but only rose by [ ]% from 1994 to 1995. *Thai Pineapple*, 1999 WL 288772, at *2 n.4. Using separate fiscal year costs has therefore narrowed the cost increase experienced by TPC because 1995 costs were used instead of the single weighted-average cost for the entire POR.

[10] It is not clear what effect using invoice date for date of sale will have on the use of sales and costs from outside the POR.

profit to total expenses and multiplying that ratio, on a transaction-by-transaction basis, by reported U.S. selling expenses. *Final Results*, 63 Fed. Reg. at 7,395. The court held that the statute intended that "profit would be allocated to U.S. sales in the same ratio as United States selling expenses are to total expenses." *Thai Pineapple*, 1999 WL 288772, at *7. Furthermore, 19 U.S.C. § 1677a(f) requires that the "statutory ratio applied to 'actual profit' for purposes of calculating CEP profit must be calculated on a proportional basis." *Id.* at *8. Commerce was directed to demonstrate on remand that the total expense denominator of the ratio to be applied to total actual profit to obtain the CEP profit adjustment contains all interest expenses (including those relating to U.S. sales) as required by 19 U.S.C. § 1677a(f)(2)(C). *Thai Pineapple*, 1999 WL 288772, at *9.

B. *Discussion*

For cost of production purposes respondent reports total interest expenses covering inventory carrying costs and credit extension expenses. *See TPC Section D Questionnaire* (Sept. 5, 1996), at D–25, field 10.0, P.R. Doc. 11 (requesting net interest expense incurred by company in connection with production and sale of foreign like product).[11] For price adjustment purposes, however, Commerce requires respondents to impute interest expenses separately for U.S. sales, even though companies may not account for such expenses separately, because, *inter alia*, relevant differences between U.S. and "home" market sales must be accounted for. *See e.g.*, 19 U.S.C. § 1677b(a)(6)(C)(iii) (1994) (circumstances of sales adjustment). It is this separate U.S. sales figure which TPC wishes included in the denominator. It also appears true, as TPC alleges, that the manner of calculating U.S. imputed interest expenses may result in some cases in amounts which are not fully reflected in the total interest expenses figure which is used in the denominator of the CEP profit ratio. *See TPC Section C Questionnaire* (Sept. 5, 1996), at C–21, field 36.0, P.R. Doc. 11 (Commerce's instructions regarding reporting U.S. credit expense). Nonetheless, Commerce argues its method will avoid double counting, and that also appears to be true as to the normal case.

Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator specified in 19 U.S.C. § 1677a(f)(2)(B), as well as "home" market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination. The lines of computer program results cited by Commerce generally support the theory. *See RR*, at 23 n.21 (citing computer lines from

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[11] Commerce states in the Remand Results that the annual interest amount reported as part of COP/CV reflects the costs of carrying merchandise in inventory and extending credit for the following reasons:

> The annual interest expense incurred by a company, and reported as an element of COP/CV, will reflect the extent to which the company does not immediately receive payment upon production of the merchandise, *i.e.*, the opportunity cost of having the merchandise sit in inventory prior to sale, and of extending credit after the sale. To the extent that a company incurs a longer waiting period between production and payment, it will not have recourse to such funds and will generally incur greater financial expenses relative to receiving payment immediately upon production.

RR, at 20–21.

Computer Program for Draft Results of Redetermination which show inclusion of interest expenses in COP, inclusion of interest expense in U.S. cost and CV, and inclusion of these costs in "Total Expenses" in the CEP profit calculation).[12] The issue is whether there is some peculiarity of this case that belies the relevancy of the theory.

TPC has not established that there is any great discrepancy here. For example, it does not demonstrate a distortion caused by differing expenses over time. Nor does it allege that in this case there can be no double counting because it had no or little actual U.S. interest expenses, but only imputed U.S. expenses.[13] Plaintiff alleges nothing to counter Commerce's reasoning on this point. Accordingly, the court sustains Commerce's CEP profit calculation.

IV. *Assessment rate for entries made after the final LTFV determination*

A. *Background*

The remaining issue on remand relates to the propriety of Commerce's assessment rate calculations. Commerce increased the cash deposit rate for entries of subject merchandise made after the final less than fair value ("LTFV") determination, but before the International Trade Commission ("ITC") final affirmative injury determination. *Remand Results*, at 2. This rate was higher than the estimated duty rate from the preliminary LTFV determination. *Compare Notice of Amended Preliminary Determination: CPF From Thailand*, 60 Fed. Reg. 9,820, 9,821 (Dep't Commerce 1995) (all others rate 3.92 percent) *with Final Determination of Sales at LTFV: CPF From Thailand*, 60 Fed. Reg. 29,553, 29,571 (Dep't Commerce 1995) (all others rate 25.76 percent).[14] The statute establishes a cap period for the assessment rate on entries made between Commerce's preliminary LTFV determination and the ITC's final affirmative injury determination. *See* 19 U.S.C.A. § 1673f(a) (West Supp. 1999).

The court remanded the issue regarding assessment rates during the cap period to allow the parties an adequate opportunity to address the issue. *Thai Pineapple*, 1999 WL 288772, at *2. TPC argues that Commerce erred in adopting the second and higher assessment rate as the cap for entries made after the final determination, but before the ITC's final injury determination. TPC contends that the statute requires that Commerce cap the amount of duties collected at the rate established in the preliminary LTFV determination.

B. *Discussion*

Commerce's longstanding practice has been to calculate separate assessment rates during the cap period: one for the time between the pre-

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[12] There was no change in the draft margin program from the draft remand results to the final remand results. *See Declaration of Gabriel Adler* (Nov. 24, 1999), at ¶ 3, Attach. 2 of Commerce's letter to the court dated Nov. 29, 1999.

[13] The court does not address whether these are truly distortive situations.

[14] The amended preliminary LTFV determination was published on February 22, 1995, the final determination was published on June 5, 1995, and the ITC's final affirmative injury determination was published on July 19, 1995. *See CPF From Thailand*, 60 Fed. Reg. at 9,820 (notice of amended prelim. determination); *CPF From Thailand*, 60 Fed. Reg. at 29,553 (final determination of sales at LTFV); *CPF From Thailand*, 60 Fed. Reg. 37,073 (ITC 1995) (ITC determination of material injury).

liminary and final determination, and another between the final determination and the ITC's final determination.[15] That the practice is longstanding is not sufficient to justify its application, however, it is also reasonable. *See Mitsubishi*, 15 F. Supp.2d at 813–14 (approving Commerce's test because it was both longstanding and consistent with the law); *cf. Sonco Steel Tube Div. v. United States*, 12 CIT 745, 749–52, 694 F. Supp. 959, 962–65 (1988) (rejecting ITA argument regarding longstanding practice because practice not explained).

The statutory section at issue is the "Deposit of estimated antidumping duty under section 1673b(d)(1)(B) of this title," which provides as follows:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission [ITC] under section 1673d(b) of this title is published shall be—
>
> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
>
> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C.A. § 1673f(a). Commerce's regulation, in effect during the first administrative review, states the Department's interpretation of this section. *See* 19 C.F.R. § 353.23 (1996). It provides that if the duties assessed in either the preliminary or final determination by Commerce differ from the duties assessed in an administrative review, Commerce will instruct Customs accordingly.[16]

Section 1673b(d) addresses the effect of Commerce's preliminary determination in the LTFV investigation. 19 U.S.C. § 1673b(d) (1994). Under section 1673b(d), if Commerce's preliminary determination is affirmative, Commerce estimates the weighted average dumping margin for exporters and producers individually investigated, and determines an all-others rate. 19 U.S.C. § 1673b(d)(1)(A)(i)–(ii). Commerce

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[15] Commerce's expression of this policy dates back to 1986. *See Antidumping Duties; Proposed Rule*, 51 Fed. Reg. 29,046, 29,051 (Dep't Commerce 1986) ("dumping margin established in the Secretary's final determination becomes the maximum amount which the Secretary may assess on entries made between publication of that determination and the publication of the Commission's final affirmative determination); *Antidumping Duties; Final Rule*, 54 Fed. Reg. 12,742, 12,757 (Dep't Commerce 1989) ("For an entry made after the final determination, the cash deposit or bond is set by the Department's final determination.").

[16] The regulation states in relevant part:

> If the cash deposit or bond required under the Secretary's affirmative preliminary *or affirmative final determination* is different from the dumping margin the Secretary calculates under § 353.22 [administrative review of orders and suspension agreements], the Secretary will instruct the Customs Service to disregard the difference to the extent that the cash deposit or bond is less than the dumping margin, and to assess antidumping duties equal to the dumping margin calculated under § 353.22 if the cash deposit or bond is more than the dumping margin.

19 C.F.R. § 353.23 (1996) (emphasis added).

The current version of this regulation, 19 C.F.R. § 351.212(d) (1999), differs slightly from the 1996 version. The 1999 version includes a description of the provisional measures deposit cap in countervailing duty cases. The 1999 version also clarifies that the duties assessed under the preliminary or final determination are "provisional duties," while the duties assessed in an administrative review are "final duties." Otherwise, there has been no substantive change to this regulation.

then orders the posting of a cash deposit, bond, or other security, and the suspension of liquidation of entries. 19 U.S.C. § 1673b(d)(1)(B)–(2). Pursuant to 19 U.S.C. § 1673d (1994), at the time of Commerce's final affirmative determination, Commerce again determines the estimated weighted average dumping margin and orders the posting of a cash deposit, bond, or other security on entries of subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate. 19 U.S.C. § 1673d(c)(1)(B)(i)–(ii).

The court has previously determined that nothing in section 1673f(a) prevents Commerce from applying two different assessment caps and, indeed, that this practice is reasonable and in accordance with law. *See Daewoo Elecs. Co. v. United States*, 13 CIT 253, 712 F. Supp. 931 (1989), *aff'd in part, rev'd on other grounds*, 6 F.3d 1511 (Fed. Cir. 1993).[17] The plaintiff in *Daewoo* presented the same types of arguments as TPC does here, asserting that the language of section 1673f(a) requires that the assessment rate be capped at the rate established in the preliminary determination. *Daewoo*, 13 CIT at 275, 712 F. Supp. at 951. The actual assessment of antidumping duties does not occur until Commerce conducts its first administrative review of entries subject to an antidumping order. *Id.* at 276, 712 F. Supp. at 952. The court in *Daewoo* held that 19 U.S.C. § 1673f(a) does not "impose a limitation on the actual assessment rate by the rates established in the ITA preliminary determination, but requires only that the amount of duties assessed on entries made prior to the ITC final determination should be 'disregarded, to the extent the cash deposit collected is lower than the duty.'" *Id.* (quoting 19 U.S.C. § 1673f(a)(1) (1988)).

Section 1673b(d) authorizes Commerce to order the suspension of liquidation and the collection of a cash deposit, bond, or other security, pursuant to the Department's preliminary affirmative determination. 19 U.S.C. § 1673b(d). In *Daewoo*, the court found that the reference to 19 U.S.C. § 1673b(d)(2) in 19 U.S.C. § 1673f(a) did not "limit Commerce's authority to adjust those preliminary rates in their subsequent final determination in LTFV investigations." *Daewoo*, 13 CIT at 277, 712 F. Supp. at 952. The court also noted that the legislative history to 19 U.S.C. § 1673b(d)(2) supported the conclusion that the preliminary deposit rates could be adjusted when more accurate information became available. *Id.* (citing S. Rep. No. 96–249, at 65 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 451). Moreover, 19 U.S.C. § 1673d(c)(1)(C) authorizes Commerce to order the suspension of liquidation and the posting of the cash deposit after a final affirmative determination where there has been a negative preliminary determination. Section 1673d(c)(1)(C) references the authorization provision of section 1673b(d)(2) regarding the suspension of liquidation. In *Daewoo*, the court held that the reference to this authorization provision in section 1673b(d) "indicates that that

[17] *Daewoo* interpreted the 1988 version of the statute. For the reasons discussed herein, the differences between the 1994 and 1988 statutory sections at issue are inconsequential. Therefore the court finds that the differences in the statute do not affect the *Daewoo* court's analysis. All references to the statute will be to the 1994, or most recent version.

provision granted Commerce a continuing authority to suspend liquidation and to collect estimated duty deposits." *Daewoo*, 13 CIT at 277, 712 F. Supp. at 953.

TPC maintains that *Daewoo* was wrongly decided, based on a plain reading of 19 U.S.C.A. § 1673f(a). Relying on *Chevron*, 467 U.S. 837, TPC asserts that the court erred when it looked to legislative history because the statute is clear, preventing the need to look beyond its plain language. The court does not agree. As noted by Commerce, the statute is silent with regard to the application of a cap between the time of Commerce's final determination and the ITC's final determination. The court in *Daewoo* therefore properly considered the legislative history in determining that Commerce's practice was in accordance with law.

In *Daewoo*, the court carefully analyzed the interplay of section 1673f(a) with sections 1673b and 1673d, as well as the overall structure and purpose of the statute. *Daewoo*, 13 CIT at 276–77, 712 F. Supp. at 952–53. The court noted that plaintiff's arguments ignored "the provisional nature of duties which are imposed as a result of the final determination and which also serve merely as estimated duty until the actual assessment rates are established as a result of the administrative review." *Id.* at 278, 712 F. Supp. at 953. Plaintiff's interpretation of 19 U.S.C. § 1673f(a) in *Daewoo* would have rendered "meaningless the meticulous calculations required under the Act in both the final determinations of LTFV investigations and final results of the first administrative review." *Id.*[18]

TPC alternatively argues that the changes made to the statute, pursuant to the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), require that Commerce change its interpretation of section 1673f(a). The court finds that the changes to the relevant statutory provision were minor, and do not undercut Commerce's practice. The changes made to 19 U.S.C.A. § 1673f(a)(1)–(2), by amendment in 1996, are inconsequential. For example, the amendment replaced the words "cash deposit" for "cash deposit, bond, or other security." *Compare* 19 U.S.C.A. § 1673f(a)(1)–(2) (West Supp. 1999) *with* 19 U.S.C. § 1673f(a)(1)–(2) (1988).

The amendments made to 19 U.S.C. § 1673b(d) were also minor. The subsection was restructured and renumbered, and the 1994 version states with greater clarity the Department's responsibilities after a preliminary affirmative determination. *Compare* 19 U.S.C. § 1673b(d) (1994) *with* 19 U.S.C. § 1673b(d) (1988). Likewise the 1994 amendments

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[18] As noted by Commerce in one of its early applications of the two-cap policy, the policy results in a more accurate assessment of estimated duties.

> [B]ecause the dumping margin established in the final determination is based on verified information afte[r] all the parties have had an opportunity to comment, it is a better estimate of the degree of price discrimination than the preliminary deposit rate, which was based only on the best information available to the Department at that time. Accordingly, once the final determination is published, estimated duties are collected * * * until the order is issued at the final, rather than the preliminary rate.

Color Television Receivers from Taiwan, 51 Fed. Reg. 46,895, 46,903 (Dep't Commerce 1986) (final results of anti-dumping duty admin. rev.), *aff'd in part and remanded in part, AOC Int'l Inc. v. United States*, 13 CIT 716, 722–24, 721 F. Supp. 314, 319–21 (1989) (adhering to reasoning of *Daewoo*), *rev'd on other grounds, Zenith Elecs. Corp. v. United States*, 77 F.3d 426 (Fed. Cir. 1996).

to 19 U.S.C. § 1673d(c) do not alter the meaning of this section. *Compare* 19 U.S.C. § 1673d(c) (1994) *with* 19 U.S.C. § 1673d(c) (1988). TPC makes much of the differences between section 1673d(c)(1)(B) (1988) and section 1673d(c)(1)(B)–(C) (1994). Sections 1673d(c)(1)(B)–(C) of the statute state the effect of a final affirmative determination by Commerce. The 1988 version of the statute grouped together Commerce's authority to order the suspension of liquidation and the posting of a cash deposit, bond, or other security, in cases where it made an affirmative final determination after a negative preliminary determination.[19] 19 U.S.C. § 1673d(c)(1)(B) (1988). The current version of the statute states that in cases of a final affirmative determination, Commerce will order the posting of a cash deposit, bond, or other security. 19 U.S.C. § 1673d(c)(1)(B) (1994). In the following subsection, the statute provides that in cases of a negative preliminary determination, Commerce will order the suspension of liquidation under the authorization provision of section 1673b.[20] *Id.*

TPC asserts that the differences in the 1994 statute require that the court's reasoning in *Daewoo* be discarded. In referring to situations where the preliminary determination is negative and the final determination is affirmative, the 1994 statute only states that Commerce shall order the suspension of liquidation, without stating that Commerce shall order the posting of the cash deposit, bond, or other security. The court does not agree that this formulation alters the holding in *Daewoo*. New section 1673d(c) is more properly read to mean that regardless of the preliminary determination result, Commerce orders the posting of a cash deposit, bond, or other security at the time of a final affirmative determination. Commerce does not need to order the suspension of liquidation in a case where the preliminary determination was affirmative, because liquidation would already have been suspended under section 1673b(d)(2). 19 U.S.C. § 1673b(d)(2). Section 1673d(c)(1)(C) singles out suspension of liquidation in referring to situations where the preliminary determination was negative and the final determination affirmative, because in such a case the suspension of liquidation would not have already occurred. *See* 19 U.S.C. § 1673d(c)(1)(C). Therefore, the change to this section of the statute has not altered the basic meaning of the provision, rather, it has clarified

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19 "(B) in cases where the preliminary determination by the administering authority under section 1673b(b) of this title was negative, the administering authority shall order under paragraphs (1) and (2) of section 1673b(d) of this title the suspension of liquidation and the posting of a cash deposit, bond, or other security." 19 U.S.C. § 1673d(c)(1)(B) (1988).

20 The statute currently reads, in relevant part:

> (c) Effect of final determination
>
> (1) Effect of affirmative determination by the administering authority
>
> If the determination of the administering authority under subsection (a) of this section is affirmative, then * * *
>
> (B)(ii) the administering authority shall order the posting of a cash deposit, bond, or other security * * * for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable, and
>
> (C) in cases where the preliminary determination by the administering authority under section 1673b(b) of this title was negative, the administering authority shall order the suspension of liquidation under section 1673b(d)(2) of this title.

19 U.S.C. § 1673d(c) (1994).

Commerce's responsibilities upon making a final affirmative determination.

None of the changes to the statute regard the Department's assessment rate capping policy for entries made after Commerce's final LTFV determination, but before the ITC's final injury determination. Commerce's interpretation and application of 19 U.S.C.A. § 1673f(a) is reasonable. If Congress objected to Commerce's longstanding practice regarding assessment caps, and intended to change that practice, it likely would have expressed such an intent in the legislative history, if not within the statutory language itself. The House Report to the URAA states that sections 1673b and 1673d (sections 733 and 735 of the Tariff Act) were amended to conform U.S. law more closely to the Uruguay Round Agreement, and does not indicate any substantive change in U.S. practice. H.R. Rep. 103–826(I), at 50–51 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3822–23.

TPC cites no legislative history to support its position that the 1994 URAA amendments reflect an intent to change Commerce's practice under section 1673f(a). Because Commerce's practice of applying two assessment cap rates is reasonable, conforms to the statute, and results in a more accurate assessment rate, and because TPC offers no weighty arguments in its favor, TPC does not persuade this court that Commerce's policy should be changed.

For the foregoing reasons, the court upholds Commerce's capping the assessment rate between the time of the final LTFV determination and the ITC's final injury determination at the final LTFV rate.

CONCLUSION

The court finds that there was no reason for Commerce to abandon its presumption of using invoice date for date of sale, and therefore reverses Commerce on this issue. Commerce must use invoice date for date of sale purposes on remand.

The court upholds Commerce's use of fiscal year costs for COP and CV purposes, and the calculation of CEP profit, as well as Commerce's practice regarding the assessment rate applied during the cap period.

Remand results are due within 30 days. Objections thereto are due 15 days thereafter and responses 11 days thereafter.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/5 Aquilino, J. 2/3/00	Alcan Aluminum Corp.	94–11–00722	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to preferential treatment under the US-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Various Aluminum in various forms and shapes
C00/6 Aquilino, J. 2/3/00	Alcan Aluminum Corp.	95–01–00011	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to preferential treatment under the US-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	St. Albans, VT Aluminum in various forms and shapes
C00/7 2/7/00 Pogue, J.	The Boeing Company	98–02–00392	7019.40.40 8.1% (1996), 8.0% (1997), 7.9% (1998) 7019.20.40 8.2% (1995)	8803.30.00 0%	Agreed statement of facts	Wichita, KS Aircraft insulation blanket
C00/8 2/7/00 Restani, J.	Mattel, Inc.	98–11–03110	9502.10.0010 Duty free for Slumber Party Barbie products 4202.92.4500 20% for clear plastic bags	9502.10.0010 Duty free for Slumber Party Barbie Products and clear plastic bags	Agreed statement of facts	Los Angeles, CA Barbie dolls in clear plastic bags

C00/9 2/8/00 Barzilay, J.	Ludvig Svensson (U.S.) Inc.	96–08–01967	6002.43.00 13.6%	8436.99.00 Duty free	Ludvig Svensson (U.S.) Inc. *v.* U.S., Slip Op. 99–82 (August 17, 1999)	Charlotte, NC Parts of agricultural machinery
C00/10 2/8/00 Barzilay, J.	Ludvig Svensson (U.S.) Inc.	98–02–00321	6002.43.00 13.2% 7616.91.00 4.4% 5903.90.25 8.3% 5515.19.09 16.0%	8436.99.00 Duty free	Ludvig Svensson (U.S.) Inc. *v.* U.S., Slip Op. 99–82 (August 17, 1999)	Charlotte, NC Parts of agricultural machinery
C00/11 2/11/00 Restani, J.	Winter-Wolff, Inc.	98–07–02538	7607.11.30 5.8%	7607.19.60 3%	Winter-Wolff, Inc. *v.* U.S., Slip Op. 98–15 (February 20, 1998)	Atlanta Laser-treated aluminum capacitor foil
C00/12 2/14/00 Wallach, J.	Universal Package Corp.	93–12–00788	CA4202.92.90 Dutiable at applicable rate of duty, depending upon year of entry, under U.S.-Canada Free Trade Agreement	CA3923.10.00 Dutiable at applicable rate of duty, depending upon year of entry, under CFTA, for plastic boxes or cases CA4819.20.00 dutiable at applicable rate of duty, depending upon year of entry, under the CFTA, for cardboard boxes or cases CA7310.29.00 Free of duty for all applicable years, for metal boxes or cases	Agreed statement of facts	Champlain, NY Coin/presentation cases or boxes of metal, plastic or cardboard

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